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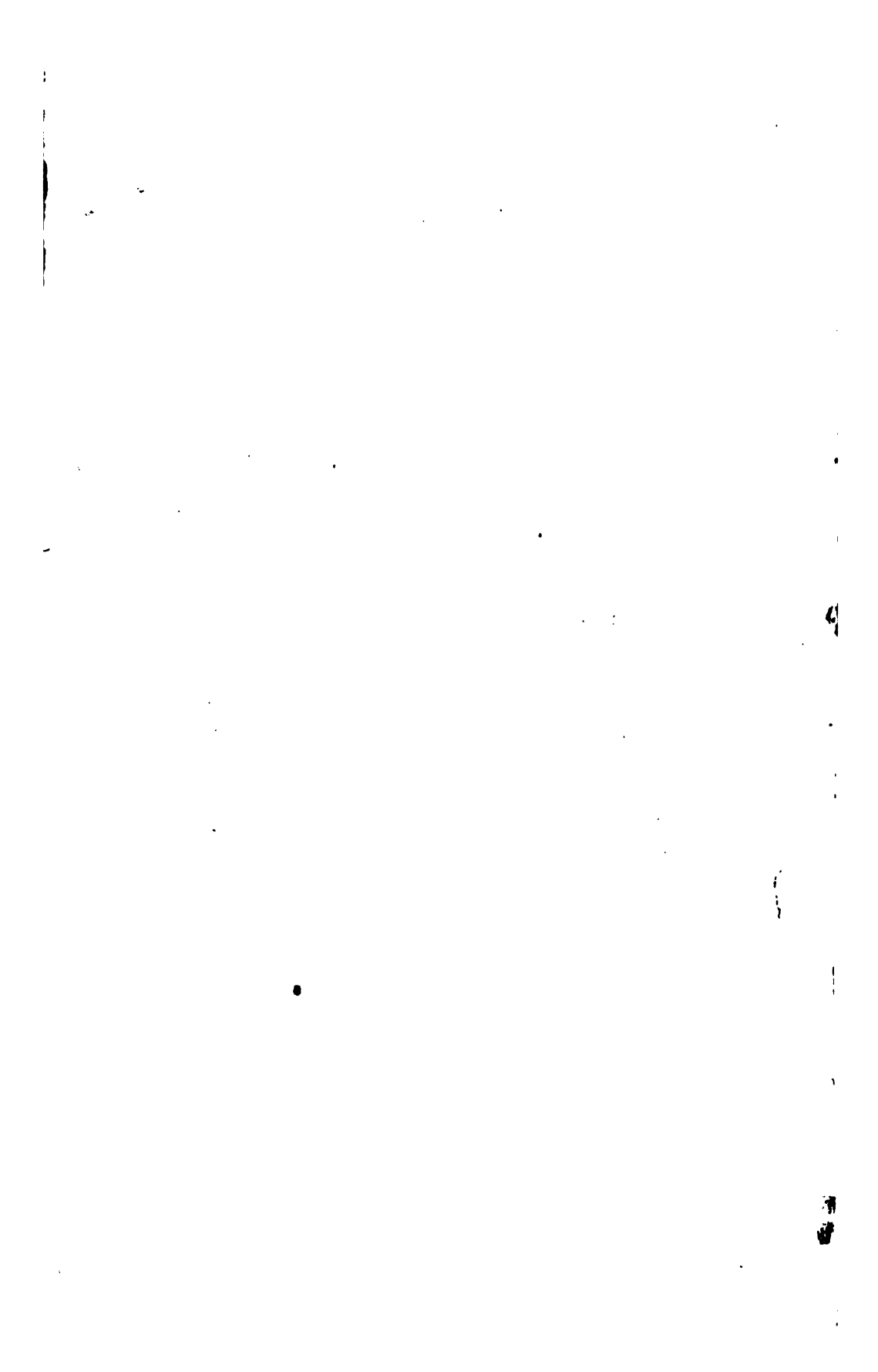


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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By AUGUSTUS N. MARTIN,
OFFICIAL REPORTER.

VOL. LVII.

CONTAINING CASES DECIDED AT THE MAY TERM, 1877, NOT
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JUDGES
OF THE
SUPREME COURT OF JUDICATURE

DURING THE TIME OF THESE REPORTS.

HON. HORACE P. BIDDLE. *§
HON. WILLIAM E. NIBLACK. †
HON. GEORGE V. HOWK. †
HON. JAMES L. WORDEN. †
HON. SAMUEL E. PERKINS. †¶

¶ Chief Justice at the May Term, 1877.

* Chief Justice at the November Term, 1877.

† Term of office commenced January 1st, 1877.

‡ Term of office commenced January 4th, 1875.

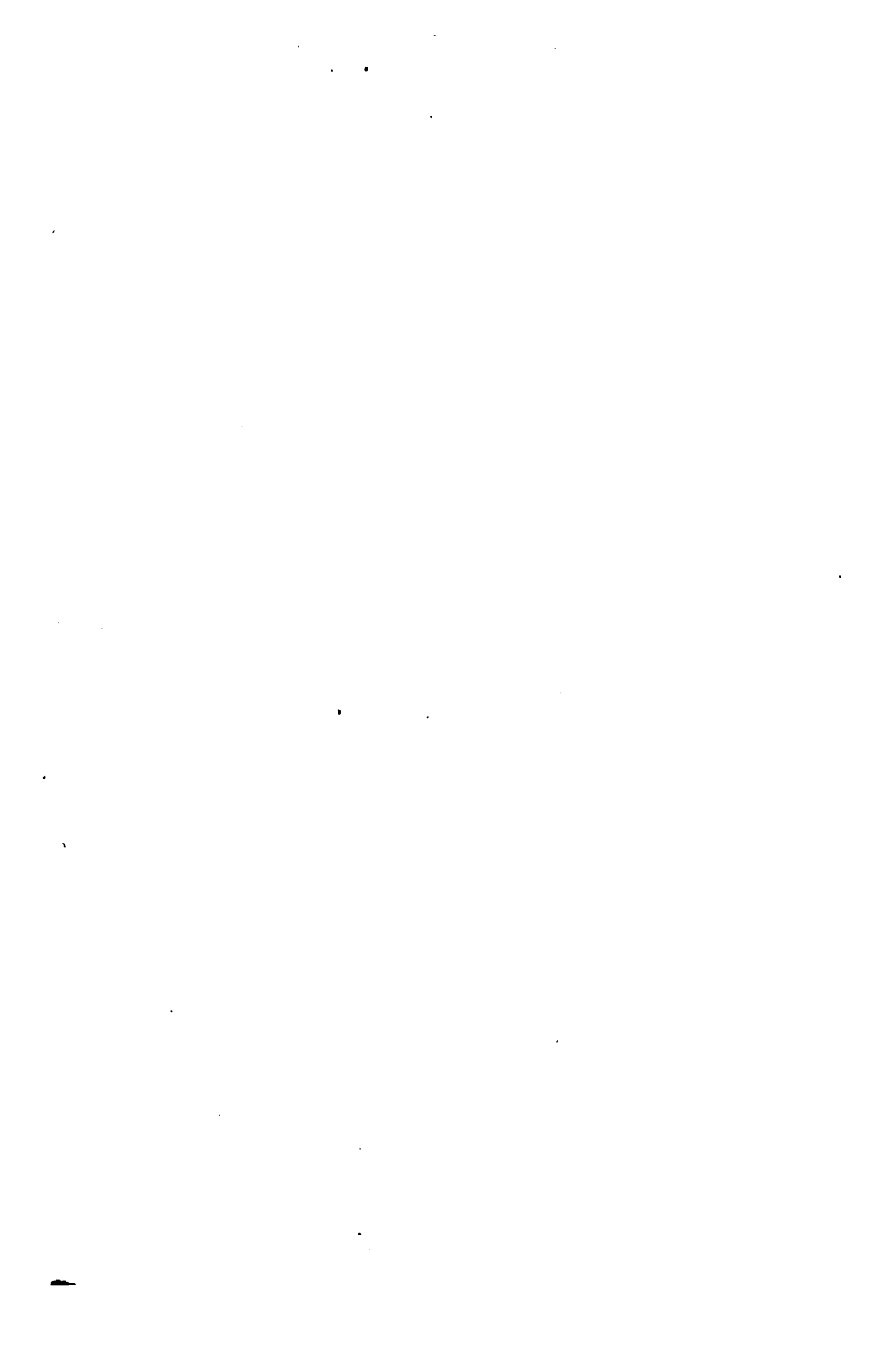


OFFICERS
OF THE
SUPREME COURT.

CLERK,
GABRIEL SCHMUCK.

SHERIFF,
JAMES P. WATSON.

LIBRARIAN,
FREDERICK HEINER.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1877, IN THE SIXTY-
FIRST YEAR OF THE STATE.

HARNES V. THE STATE, EX REL. PLATT.

BASTARDY.—*Compromise of Prosecution.*—*Entry of.*—*Attorney.*—*Authority of Revoked by Client's Death.*—Where, pending a prosecution for bastardy, the defendant paid the prosecuting witness a certain sum of money in satisfaction of her claim on account of the support of the bastard child, and the prosecuting witness thereupon signed a written statement that provision to her satisfaction had been made for the support of said child, in said sum paid her by the defendant, and that she thereby released him from all claim, etc., which statement was placed in the hands of her attorney, with instruction to appear for her and file it in open court, admitting that she had received from the defendant full provision for the support of said child, to her satisfaction, and with the instruction, and upon the agreement of the parties, that said attorney should cause the prosecution to be dismissed; and said attorney afterward filed said statement in open court and moved that the cause be dismissed, but action by the court was postponed for the personal presence of the prosecuting witness, who died before further steps were taken, and after her death said child prosecuted the action by guardian *ad litem*;

Held, that, no admission of the prosecuting witness, or finding of the court, that provision had been made for the support of the child, having been entered of record, and no motion for the entry of record of such admis-

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sion having been made, in the lifetime of the prosecuting witness, the statute (2 R. S. 1876, p. 660, sec. 17) was not complied with, and that these facts could not constitute a sufficient answer to the action in favor of said child.

Held, also, that, by the death of the relatrix, the authority of her attorney to act for her ceased.

EVIDENCE.—*Cross-Examination.*—*Testimony, on Former Trial, of Witness since Deceased.*—On the trial of an action which had been tried once before, a person, testifying for the defendant as to the testimony, on the former trial, of a witness since deceased, stated that said deceased witness had testified to certain facts, and had not been cross-examined. The plaintiff, in rebuttal, introduced a witness, who testified that he had heard the testimony, on the former trial, of said deceased witness, related some of his testimony, and stated that he testified to other matters and was cross-examined. On cross-examination by the defendant of this rebutting witness, he was asked to state all that said deceased witness had testified to on said former trial.

Held, that it was error to sustain an objection to this question.

SAME.—It is error to deny a party the right, in cross-examining his adversary's witness, to propound a question within the limits of proper cross-examination, though the party asking the question does not state what he expects to prove by the answer.

From the Carroll Circuit Court.

Sims, Stewart & Sims and R. P. & J. C. Davidson, for appellant.

S. T. McConnell and J. Applegate, for appellee.

WORDEN, J.—This was a prosecution by the appellee, against the appellant, for bastardy. The action was commenced on the relation of Margaret J. Platt, but during its pendency she died, and the name of the child, Walter Platt, was substituted, and Stewart T. McConnell was appointed as his guardian *ad litem*, in accordance with the provisions of the statute.

Trial by jury; verdict and judgment against the defendant.

We will consider a point arising on the pleading, before examining a question arising on the motion for a new trial.

The second paragraph of the defendant's answer alleged, "that, since the institution of the present suit, the de-

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fendant and the relatrix herein" (the said Martha) "met by appointment in the office of her attorney, and then and there compromised this suit, and the defendant then and there paid and satisfied the said relatrix for any and all claims against him, on account of the support of said bastard child, and then and there made provision, by the payment to her of the sum of three hundred dollars, to her entire satisfaction, for the support and maintenance of said bastard, a written statement of which was then and there made by her said attorney, Hon. David Turpie, signed by her and placed in the hands of her said attorney, with instruction to appear for her in open court and file said statement as her act in open court, admitting that she had received from this defendant full provision for the support of her said bastard child, to her entire satisfaction, and with the further instruction, which was a part of the agreement by and between the parties, that her said attorney should, upon the filing of said paper, cause the said cause to be dismissed, by agreement, at the defendant's costs; and defendant further avers, that, on the 2d day of August, A. D. 1873, the Hon. David Turpie, as attorney for the relatrix aforesaid, did appear in open court and cause said statement, a copy of which is filed herewith and made a part of this answer, to be filed in open court, and, as her said attorney, moved the court that said cause be dismissed, at the costs of the defendant; and defendant further avers, that said dismissal was postponed for the personal presence of the said relatrix, and that before that could be obtained she died.

"Wherefore defendant says, that no judgment should be rendered herein against him, he having paid all the costs which had accrued in said cause up to the date of, and including, the filing of said statement, and the costs made therein."

The written statement mentioned in the pleading is as follows:

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“State of Indiana, Cass County, ss :

“Know all men by these presents, that Martha Platt hereby releases George Harness, Jr., from all claim, demand and charge against said George Harness, Jr., on account of the charge I have made against him for the paternity of a bastard child, and I acknowledge that full satisfaction has been made to me for the support and maintenance of said child, and I hereby release the said George Harness, Jr., from all liability on account of the alleged paternity of said child, and that full satisfaction has been made to me therefor, having received three hundred dollars therefor. Witness,” etc.

[Signed,]

“MARTHA PLATT.”

A demurrer for want of sufficient facts was sustained to this paragraph of answer, and the ruling is complained of as erroneous.

The statute provides, that “The prosecuting witness, if an adult, may, at any time before final judgment, dismiss such suit, if she will first enter of record an admission that provision for the maintenance of the child has been made to her satisfaction, and if such witness be a minor, she may dismiss such suit, if it be first shown to the satisfaction of the court, in which the same is pending, that suitable provision has been made and properly secured for the maintenance of the child, and a finding of the court to that effect entered of record; and such entry, in either case, shall be a bar to all other prosecutions for the same cause and purpose.” 2 R. S. 1876, p. 660, sec. 17.

It will be seen by the statute, that a different provision is made in regard to adults from that in regard to infants. An adult may dismiss such actions by simply entering of record an admission that provision for the maintenance of the child has been made to her satisfaction; while, in the case of an infant, it must be shown to the satisfaction of the court, that suitable provision has been made and properly secured for the maintenance of the child, and the finding of the court to that effect must be entered of rec-

ord. It is the entry of record in either case that bars any further prosecution.

Assuming, as we think we must, that the relatrix was an adult, the contrary not appearing, still the paragraph of answer does not bring the case within the statute.

Without intimating any opinion upon the question, whether an adult prosecuting witness might or might not, by attorney and without a personal appearance in court, cause the entry to be made, provided for by the statute, we think the paragraph was bad, because it did not show that such entry had ever been made.

It does not appear by the pleading in question, that Hon. David Turpie moved, on behalf of the relatrix, that an admission on her part, that provision for the maintenance of the child had been made to her satisfaction, be entered of record. He filed the statement, and moved that the cause be dismissed. Before the matter was acted upon by the court, however, the relatrix died. This put an end to any power which Hon. David Turpie had, as her attorney, to act in the matter. Thus there was, during the life of the relatrix, no entry of record made of the admission required by the statute, nor, indeed, any motion that such entry be made. The statute not having been complied with, the demurrer to the paragraph was properly sustained. *Reeves v. The State, ex rel., etc.*, 37 Ind. 441.

We come now to a question arising on the motion for a new trial.

It appears that the case had been once before tried, and a new trial granted. On the former trial, a Mrs. Susannah Forgry testified as a witness, but she was dead at the time of the second trial.

On the latter trial, one Andrew J. Forgry was introduced by the defendant as a witness, and testified as follows:

"My wife, Susannah Forgry, was a witness in this case; was sworn and examined in this case, on the trial in the circuit court in Cass county, in this State. I heard her

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testimony on that trial; I was back about twenty-five feet from where she was at the time she gave her testimony, and there may have been some words I did not hear. She was not cross-examined. I did hear and can repeat her testimony on that trial as to what she testified that Martha Platt, the mother of the relator, told her as to who was the father of her child. * * * * *

"On the former trial of this cause, she testified that Martha Platt told her she would have to lay it to George Harness; they said if she laid it to George Harness he would marry her. If she laid it to Frank Harness, Sally Platt would kill her, or drive her away from home. This was her testimony on that subject, as far as I remember."

The plaintiff, in rebuttal, introduced Stewart T. McConnell as a witness, who testified as follows:

"I was present at the former trial of this case, in the Cass Circuit Court, and heard the testimony of Mrs. Susannah Forgy, on said trial. I was attorney for plaintiff, on said trial. There was quite an extended cross-examination of said witness, on said trial. She testified on that trial, that Martha Platt, the mother of the child, told her she would lay her child to George Harness, the defendant, because they said if she did he would marry her. She also testified to other matters; her examination was quite extended."

Upon cross-examination of this witness, the defendant asked the witness to state all that said Susannah Forgy had testified to on said trial; but the plaintiff objected, and the court sustained the objection, and refused to allow the witness to state all that said Susannah had testified to on said trial, and the defendant excepted.

In this ruling, we think the court committed an error.

The defendant had introduced the husband of Susannah Forgy, who had stated his recollection of her evidence; but he said she was not cross-examined. His memory in this respect may have been at fault. The plaintiff then introduced Mr. McConnell, who stated a

part of her evidence; that she testified to other matters, was cross-examined, and that her examination was quite extended.

It seems to us to be clear, that the defendant, upon cross-examination, was entitled to bring out all that said Susannah had testified to on the former trial. An isolated portion of the evidence of a witness might give no just appreciation of the force and effect of the evidence, taken as a whole. The evidence of a witness in chief is often materially modified, and, indeed, sometimes wholly changed, by the cross-examination. This is within the experience of every practising lawyer.

A jury, in the intelligent performance of its duty, takes into consideration the whole of the evidence of a witness, and not an isolated portion alone of it. The plaintiff having introduced Mr. McConnell, and proved by him a portion of the evidence of the deceased witness, and that she was cross-examined, and gave other evidence, opened the door to the defendant to prove on cross-examination all that was testified to by the deceased witness.

But it is claimed by the appellee that no available error was committed, because the defendant did not state to the court what he proposed to prove by the cross-examination. And cases in this court are cited to show, that where a question is propounded to a witness, which does not show what is proposed to be proved, and the party does not state what he proposes to prove, it will not be error to reject it, because it does not appear in such case that the party was injured. See *Cones v. Binford*, 54 Ind. 516. But the reason and spirit of that rule have no application to such a case as the present. The rule is more peculiarly applicable to examinations in chief, where the party offering the evidence knows, or may be supposed to know, and therefore be able to state, what he proposes to prove. The rule could seldom, if ever, be applied to cross-examinations, which are confined to the subject-

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matter of the examinations in chief. A party can hardly be expected to know what his adversary's witness will testify to on cross-examination, nor could he well state to the court what he expected to elicit by such examination. We think, therefore, that a party has a right to cross-examine his adversary's witness, keeping within the limits of a proper cross-examination, and that it is error to deny such right, though the party did not state what he proposed to prove by the cross-examination. For the error committed, the judgment will have to be reversed.

The judgment below is reversed, and the cause remanded, for a new trial.

BEARD v. THE STATE.

CRIMINAL LAW.—Indictment.—Endorsement on.—Motion to Quash.—Record on Change of Venue.—The fact that the record of a criminal cause, on a change of venue to another county, fails to show that the indictment therein had been endorsed "a true bill," over the signature of the foreman of the grand jury, is not ground for a motion to quash.

SAME.—Supreme Court.—Where, in such case, on appeal to the Supreme Court, the record shows such indictment to have been endorsed "a true bill," over the signature of the grand juror whom the record shows to have been the foreman of the grand jury which found and returned such indictment, it is sufficient.

SAME.—Motion to Dismiss Action.—Bill of Exceptions.—Practice.—No question in relation to the action of a court, on a motion to dismiss a criminal cause, is presented to the Supreme Court, on appeal, when neither such motion, the action of the court thereon, nor any exception to such action, is made part of the record by a proper bill of exceptions.

From the Vanderburgh Criminal Circuit Court.

H. C. Pitcher, for appellant.

R. V. Hodson and *J. Brownlee*, Prosecuting Attorneys,
and *C. A. Buskirk*, Attorney General, for the State.

Howe, J.—At the October term, 1876, of the Posey

Circuit Court, the appellant and one Parish Huff were jointly indicted, by the grand jury of said court and term.

The indictment was in two counts; the first charging the defendants with burglary, and the second charging them with grand larceny.

To this indictment the appellant, upon arraignment, entered a plea of not guilty, and, on his application, the venue of the case was changed to the court below.

It appears from the record, that, on the 15th day of November, 1876, there were filed in the court below the original indictment in this cause, and a certified transcript from the Posey Circuit Court, containing only the proceedings in the cause in open court, showing the appellant's arraignment and plea, his application for a change of venue, and the order of said court granting such change of venue to the court below. Afterward, and before any action was had in this case in the court below, on the 23d day of November, 1876, there was filed therein another certified transcript from the Posey Circuit Court, containing not only the proceedings in this case, as set forth in the first transcript, but also the preliminary proceedings of said court, in empanelling a grand jury for its October term, 1876, and the return to said court, by its said grand jury, of the said indictment against the appellant and his said codefendant.

At the December term, 1876, of the court below, the appellant withdrew his plea of not guilty, and moved the court to quash the indictment, which motion was overruled, and to this decision the appellant excepted. And the appellant then moved the court below to dismiss the proceedings in this cause, and to discharge him from the custody of the sheriff, which motion was also overruled, and the appellant excepted to this decision. The appellant then reentered his plea of not guilty, and the issues joined were tried by a jury in the court below, and a verdict was returned, finding the appellant guilty of burglary as charged, and assessing his punishment at a fine of forty

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dollars, and imprisonment in the state-prison for the term of two years. And, over appellant's motion for a new trial and exception saved, judgment was rendered upon the verdict by the court below.

In this court, the appellant has assigned the following alleged errors of the court below :

1st. In overruling the appellant's motion to quash the indictment;

2d. In overruling the appellant's motion to dismiss the proceedings and to discharge him from the sheriff's custody; and,

3d. In rendering judgment against the appellant.

In discussing the first of these alleged errors, the appellant's attorney says: "The motion to quash should have been sustained. The transcript failed to show that the indictment was endorsed by the foreman of the grand jury '*a true bill.*'" If it were true, that the record of this cause failed to show that the indictment was properly indorsed "*a true bill,*" over the signature of the foreman of the grand jury, we do not think that this defect is one which could be reached by a motion to quash the indictment. It is not claimed in this case, that the indictment was not, in fact, properly endorsed by the foreman of the grand jury; but it is claimed that the certified transcript from the Posey Circuit Court failed to show any such endorsement. The original indictment, with all its endorsements, was a necessary part of the record, on appeal to this court; and it appears therefrom, that the indictment in this case was properly endorsed "*a true bill,*" over the signature of the person whom the certified transcript from the Posey Circuit Court showed to have been the foreman of its grand jury, when said indictment was returned into said court. This was held to be sufficient by this court, in the case of *Willey v. The State*, 46 Ind. 368, and we adhere to that decision. In the case cited, it was also held, that "a motion to quash an indictment must, as a general rule, be predicated upon objections

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apparent upon the face of the indictment." 2 R. S. 1876, p. 399, sec. 101; and *Bell v. The State*, 42 Ind. 335, and authorities there cited. It is manifest, that appellant's objection to the indictment, in this case, was not apparent, either on the face or on the back of said indictment. And, therefore, we hold that no error was committed by the court below, in overruling the appellant's motion to quash said indictment.

Appellant's motion to dismiss the proceedings in this cause, and for his discharge from the custody of the sheriff, the decision of the court below thereon, and appellant's exception to such decision, were not made a part of the record by a proper bill of exceptions. The second alleged error, complained of by appellant, is not apparent, therefore, in the record of this cause, and no question is thereby presented for our consideration.

In our opinion, the record of this cause fails to disclose any good or sufficient reason for the reversal of the judgment of the court below.

The judgment is therefore affirmed, at the costs of the appellant.

THE FRANKLIN INSURANCE COMPANY OF INDIANAPOLIS v.
COOK.

BILL OF EXCEPTIONS.—*Supreme Court.*—*Evidence.*—*Application to Set Aside Default.*—On appeal to the Supreme Court, from the finding of a court upon an application to it to set aside a default, tried upon affidavits submitted by the parties, no question is presented as to the sufficiency of the evidence to sustain the finding, unless the bill of exceptions affirmatively shows that it contains all of the evidence.

From the Marion Superior Court.

J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.

Stout, Adm'r, v. Albert.

H. W. Harrington, for appellee.

BIDDLE, J.—Action by Sophia Cook, against The Franklin Insurance Co. of Indianapolis, founded on a policy. The appellant was defaulted in the court below, and judgment rendered on the default, in favor of the appellee. Several weeks afterward, the appellant moved the court below, in writing, to set aside the default, and allow the appellant to plead to the action. Affidavits were filed in support of and against the motion, which the court, on a hearing of the case, overruled. Motion for a new trial was made, causes filed, motion overruled, exception taken, and an appeal to the general term, wherein the judgment at the special term was affirmed. Appeal to this court.

The bill of exceptions sets out various affidavits, etc., but nowhere informs us that it contains all the evidence. We must presume, therefore, that the court below properly overruled the motion to set aside the default, the process and service being sufficient on the face of the record.

The appellant assigns as error the insufficiency of the complaint, but the point is not noticed in the brief. We do not, therefore, consider it.

The judgment is affirmed, with costs.

STOUT, ADM'R, v. ALBERT.

From the Orange Circuit Court.

G. V. Hawk and *W. W. Tuley*, for appellant.

F. Wilson, *T. L. Collins*, *A. C. Voris*, and *J. W. Tucker*, for appellee.

NIBLACK, J.—This was a proceeding, in the court below, by Leonidas Stout, administrator of the estate of Eliza

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Bowles, deceased, who had previously been appointed as such administrator in Floyd county, against John C. Albert, to set aside and annul letters of administration on said estate, which had been afterward issued to the said Albert, in Orange county.

There was a trial by the court, and a finding and judgment for Albert.

The appellant has assigned certain errors upon the record in this court, and the appellee has confessed the errors thus assigned.

It has also been agreed between the parties, that the judgment below shall be reversed, at the costs of the appellee, and that the cause shall be remanded, with instructions to the court below, to set aside and revoke the letters of administration which were granted to the appellee on said estate.

The judgment is therefore reversed, at the costs of the appellee, and the cause remanded, for further proceedings, in accordance with the agreement of the parties, as herein above set forth.

Howk, J., having been of counsel, was absent.

SHERROD v. SHIRLEY ET AL., ADM'RS.

PLEADING.—Complaint.—Names of Parties.—Omission Cured by Answer.—Decedents' Estates.—Justice of the Peace.—A complaint filed in the court of a justice of the peace, by the administrator of a decedent's estate, set out the initials only of the plaintiff's Christian name; but the defendant, in a written answer by him filed, set out the full names of all the parties.

Held, that the complaint was defective, but that such defect was cured by the answer.

SAME.—Bill of Particulars.—Where, in such action, the complaint professes, but fails, to set out a bill of particulars of an account, on which the action is brought, it is insufficient.

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Sherrod v. Shirley *et al.*, Adm'rs.

From the Hendricks Circuit Court.

C. C. Nave and C. A. Nave, for appellant.

BIDDLE, J.—The appellees, who are administrators, brought this suit before Thomas B. Hall, a justice of the peace, against the appellant, on the following cause of action :

"G. W. Shirley & E. Dicks, Adm'rs of the Estate of John A. Dicks, deceased, v. Solomon S. Sherrod."

"Before Thomas B. Hall, Justice of the Peace of Union township, Hendricks county, Ind.

"Said plaintiffs complain of the defendant, and say that the defendant is indebted to him," [them] "as shown by an itemized account filed herewith, in the sum of forty-two dollars, for which he" [they] "demand judgment and other proper relief. Account to be filed."

The venue was changed from Justice Hall to Justice Isaac Burnett, of the same township. The transcript states, that, before Justice Burnett, "the plaintiffs, by their att'y, D. C. Lane, now filed their itemized account," but no itemized account is found anywhere in the transcript. The appellant then moved to dismiss the cause, for the reason that the itemized account was not "filed at the proper time." This motion was overruled by the justice. The appellees next sought and obtained a change of venue from Justice Burnett to Justice James M. Wells, before whom appellant filed an answer to the complaint. A trial was had upon the issues, and judgment rendered in favor of appellees. From this judgment the appellant appealed to the circuit court, wherein he moved "to dismiss the cause for want of a sufficient cause of action." This motion was overruled, and exception reserved.

A jury trial was had, verdict for appellees, and, over a motion for a new trial and exceptions, a judgment rendered. Appeal to this court.

One of the assigned errors is, overruling the motion to

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dismiss the cause in the circuit court, for want of a sufficient cause of action. Two objections are taken to the cause of action: First, that it does not set out the names of the plaintiffs below. This is a fatal objection if not cured; but it may be cured by the process, amendment, or by a pleading wherein the names are properly stated. In pleading to the cause of action, by an answer which stated the names of the plaintiffs in full, before justice Wells, the appellant cured this alleged error. *Widup v. Gibson*, 53 Ind. 484.

But we think the second objection, namely: that the cause of action is insufficient, is well taken. Although no particular formality is required in pleading before a justice of the peace, yet the statement must be sufficient to apprise the opposite party of the nature of the claim, and such as could be pleaded in bar to a subsequent action for the same thing. In this case, although the transcript says, that the appellants "filed their itemized account," yet the items are not given. There is nothing to inform the opposite party of the nature of the claim, nor any thing which could be pleaded in bar of another action. *Wolf v. Schofield*, 38 Ind. 175; *Stephenson v. Ballard*, 50 Ind. 176; *Crocker v. Hoffman*, 48 Ind. 207. We are therefore constrained to reverse the judgment, at the costs of the appellees, to be paid out of assets in their hands yet to be administered.

Judgment accordingly.

CONNER v. THE BOARD OF COMM'RS OF FRANKLIN COUNTY.

PAUPER.—*Medical Attendance Upon.—Physician.—Liability of County.—Township Trustee.*—Where no physician to attend upon the paupers of a county has been employed by its board of commissioners, or where, one having been so employed, he has abandoned such employment, the trustee of a civil

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township may employ a physician to attend upon paupers of his township requiring medical treatment, and the county is liable to such physician for the value of services rendered by him under such employment.

From the Franklin Circuit Court.

J. R. McMahan, T. H. Smith and F. Berry, for appellant.

F. S. Swift, for appellee.

Howk, J.—Appellant, as plaintiff, sued the appellee, as defendant, in the court below.

Appellant's complaint was in two paragraphs, to each of which paragraphs the appellee demurred, upon the ground that the facts stated therein were not sufficient to constitute a cause of action. These demurrers were sustained by the court below, and to these decisions the appellant excepted, and judgment was rendered on the demurrers, for the appellee.

The appellant has assigned in this court, as alleged errors, the decisions of the court below, in sustaining appellee's demurrers to each paragraph of his complaint. As these alleged errors call in question the sufficiency of the complaint, we will summarize, as briefly as we can, the facts stated in each paragraph.

In the first paragraph of his complaint, the appellant alleged, in substance, that he was, and had been for the last twenty years, a practising physician of Franklin county, Indiana; that the appellee was indebted to him in the sum of fifty-three dollars and fifty cents, for medicines furnished, and medical attention and services rendered, to certain persons named, at the instance and request, and under the direction and employment, of the trustee of Metamora township, in said county; that, at and during the time of furnishing said medicines and rendering said services, and at the date of the employment of the appellant by said trustee, the said persons named were paupers and a temporary charge upon said county, and *bona fide* residents and inhabitants of and in said Meta-

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mora township; that during all of said time there was no physician in said county whose duty it was to attend on, and afford relief to, the paupers of said township, outside of the poor-house and jail of said county, and none of the paupers named were in the poor-house or jail of said county, during the time of appellant's attendance on them; a bill of particulars of said indebtedness was filed with and made part of the complaint; that said bill was duly presented to appellee, at its September term, 1875, for allowance and payment, but that appellee refused to allow and pay the same; and that said bill was then due and unpaid; wherefore, etc.

The second paragraph of the appellant's complaint contained all the allegations of the first paragraph, except the allegation that the bill had been presented to the appellee for payment, with the following additional averments: "That the physician, who had been employed by said board to attend on the paupers of said township, during said time, had left said county and abandoned his contract with said board to care and attend on the paupers of said township, and refused to perform said duty; and that there was no other physician or person whose duty it was to attend on and afford relief to the paupers of said township, who were not inmates of the poor-house or jail of said county."

A single question is presented for our consideration by the record of this cause, which question may be thus stated: Under the facts stated in either paragraph of appellant's complaint, was the trustee of Metamora township authorized by law to employ the appellant to attend as a physician on the paupers of said township, so as to render the appellee liable to the appellant for the payment of his services under such employment? We think this question must be answered in the affirmative, upon the facts stated in each paragraph of the complaint. The township trustee is by law the overseer of the poor

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of his township. 1 R. S. 1876, p. 676, sec. 1. He is required to see that all poor persons in his township "are properly relieved and taken care of in the manner required by law." 1 R. S. 1876, p. 677, sec. 6. If the board of commissioners of his county fails to contract with a physician to attend upon the poor of his township, as is alleged in the first paragraph of appellant's complaint, the law contemplates that the township trustee, as the overseer of the poor of his township, shall employ such medical or surgical services as the paupers within his township may require. 1 R. S. 1876, p. 68, sec. 8. The spirit and intention of the legislation of this State, on this subject, seem to require that the paupers of each county shall, in any event, receive necessary medical or surgical attention, at the expense of the county. The county board may "contract with physicians to attend upon the poor generally in the county," and, in case of such contract, the law provides, that "no claim of a physician or surgeon for such services shall be allowed by such board except in pursuance of the terms of such contract." Sec. 8, *supra*. But it is expressly provided, in the same section, that it "shall not be so construed as to prevent the overseers of the poor or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his, or their jurisdiction, may require." We think that the case made in the 2d paragraph of appellant's complaint comes fairly within the foregoing proviso; for, if the contracting physician, whose duty it was to attend upon the poor of Metamora township, had abandoned his contract and moved away from the county, as alleged, then the township was "not otherwise provided for," and the trustee had the right to employ such medical or surgical services as the paupers of his township might require. The expense of all such services, under such employment, is a proper charge against the county. In the case of *The Commissioners of Morgan County v.*

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Holman, 34 Ind. 256, it was held by this court, that where medical services are rendered by a physician, under the employment of a township trustee, to paupers of his township, such employment, in the absence of fraud or collusion, is conclusive in a suit to enforce the collection of the claim against the county for such services. See also the case of *The Board of Commissioners of Bartholomew County v. Ford*, 27 Ind. 17.

In our opinion, each of the paragraphs of appellant's complaint, in this case, stated facts sufficient to constitute a cause of action against the appellee; and, therefore, we hold that the court below erred, in sustaining the appellee's demurrers to each of said paragraphs.

The judgment of the court below is reversed, at the appellee's costs, and the cause is remanded, with instructions to the court to overrule the appellee's demurrers to appellant's complaint, and for further proceedings.

THE STATE v. SCHULTZ.

CRIMINAL LAW.—Perjury.—Indictment.—County Commissioners.—An indictment for perjury, alleged to have been committed by a witness during the pendency of a proceeding before the "board of commissioners of said county," where the name of such county has been previously mentioned therein, sufficiently names such board.

SAME.—Time.—Venue.—Where, in such case, such proceeding is first alleged to have occurred at a certain time and county, a subsequent averment by the indictment, that the alleged perjury occurred "then and there," sufficiently fixes the time and lays the venue.

SAME.—Highway.—Statute Construed.—Notice.—Petition to Enter of Record.—An indictment for perjury was based upon the alleged false swearing of a witness before a board of commissioners, during the hearing by them of a petition to enter of record a certain public highway, alleged to have been used as such, without having been recorded, for more than twenty years, in that the defendant had then and there falsely testified as a witness that such highway had been so used "for more than twenty years."

57	19
135	257
57	19
147	162
57	19
148	8

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Held, that the charge was predicated upon a material matter.

Held, also, that section 45, 1 R. S. 1876, p. 534, of the act in relation to the location of highways, contemplates two different states of circumstances, under either of which the commissioners of a county may direct that a highway be entered of record, viz.: 1st, roads used as highways, which have been laid out, but not sufficiently described; and, 2d, highways that have been used as such for twenty years, but not recorded.

Held, that, in either of such cases, notice of a petition to have such highways described or entered of record need not be given.

From the Warrick Circuit Court.

G. L. Reinhard, Prosecuting Attorney, and *C. A. Buskirk*, Attorney General, for the State.

I. S. Moore, for appellee.

WORDEN, J.—The grand jury in the court below returned an indictment against the appellee, which, omitting the formal parts, is in the following words:

“The grand jurors for the county of Warrick, and State of Indiana, upon their oaths, present and charge, that, at the regular March term, 1876, of the board of commissioners of said county, to wit, on the 8th day of March, in the year 1876, at said county, before John Erwin, Andrew J. Taylor and John Trisler, commissioners as aforesaid, a certain petition was filed before said board of commissioners, then and there in session as aforesaid, to establish a certain highway of twenty years’ standing, which said petition is in words and figures following, to wit:

“To the Honorable, The Board of Commissioners of Warrick County, Indiana, March term, A. D. 1876:

“The undersigned would respectfully represent, that a road, commencing at the east side of the old embankment of the Straight Line Railroad, east of and adjoining the town of Elberfield, in said county, and nearly opposite of the east end of Walnut street, in said town, and on the half mile line dividing sec. 19 east and west in the centre of said section, in town 4 S., R. 9 west, and running thence due east about one and $\frac{3}{4}$ miles, to Pigeon Creek, has been in use for twenty years as a public highway,

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and is necessary to the convenience of the public that the same shall remain open and maintained as such highway; that said road does not exceed in width twenty-five feet; therefore they demand that said road be entered of record, and the same be declared a public highway, and as in duty bound they will ever pray.

“ ‘WILLIAM SCHULTZ,

“ ‘FREDERICK SICKMAN,

“ ‘H. KOLLE,

“ ‘FRED. KROEGER.’

“That afterward, to wit, on the day and date last aforesaid, and during the term aforesaid of the board of commissioners aforesaid, the said board were then and there trying, and then and there did try, a certain issue, point and question, as to whether the pretended road or highway described in the petition aforesaid had been in use for twenty years as a public highway, and was necessary to the convenience of the public that the same should remain open and maintained as such highway; which said proceeding by said board of commissioners was then and there in due form of law, the said board then and there having competent authority in that behalf; upon which said trial William Schultz then and there appeared as a witness for, and on behalf of, said petitioners, to wit, William Schultz, Frederick Sickman, Henry Kolle and Frederick Kroeger, whose names are signed to said petition; and the said William Schultz was then and there duly sworn, and took his corporal oath before said board of commissioners, which said oath was then and there administered to said William Schultz, by one John Nestor, who was then and there the auditor of said county, and then and there had competent authority in that behalf, that the evidence which the said William Schultz should give to the said board of commissioners, touching the matter then in question, should be the truth, the whole truth, and nothing but the truth; and at and upon the trial of said issue, point and question, as aforesaid, it then

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and there became a material question whether the road, or pretended road, described in said petition, had then and there been in use and maintained as a public highway for over twenty years; and the said William Schultz then and there, on the trial of said issue, point and question, upon his oath aforesaid, feloniously, wilfully, corruptly and falsely, before the board of commissioners aforesaid, did depose and swear in substance and to the effect following, that is to say: that the said road in said petition described had been then and there in use and operation as a public highway for over twenty years; whereas in truth and in fact the said road so described in said petition as aforesaid had not then and there been in use for over twenty years, nor for more than twelve years, if indeed it had been in use as such; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said William Schultz, on the said 8th day of March, in the year 1876, before the board of commissioners aforesaid, upon the trial aforesaid, in manner and form aforesaid, did feloniously, wilfully, corruptly and falsely commit wilful and corrupt perjury."

On motion of the defendant the indictment was quashed, and the State excepted, and appeals to this court.

We proceed to consider the objections which the appellee makes to the indictment.

1. It is objected that the name or style of the court in which the perjury was alleged to have been committed was not correctly stated, and the case of *The State v. Street*, 1 Murphey, 156, is cited in support of this objection.

In the case cited, the perjury was alleged to have been committed in a certain "*Superior Court*," while the legal name of the court was "*Superior Court of Law*," and the objection was held fatal, on a motion in arrest of judgment.

The true name of the court in this case was "The

Board of Commissioners of the County of Warrick." 1 R. S. 1876, p. 350, sec. 5.

In the indictment, the offence is charged to have been committed before "The Board of Commissioners of said county." But Warrick county having been previously mentioned, the statement is equivalent to a statement that it was committed before "The Board of Commissioners of Warrick County;" and the designation, it seems to us, signifies the same thing as "The Board of Commissioners of the County of Warrick."

We are of opinion that there is no substance in this objection.

2. It is objected that no day certain was stated, on which the offence was committed. This is a misapprehension. The 8th day of March, in the year 1876, had been mentioned. The evidence alleged to have been false was charged to have been given "then and there." This doubtless referred to the time and place previously mentioned.

3. It is claimed that the indictment was properly quashed, because it did not allege that the crime was committed in Warrick county. The county had been previously mentioned, and the word "there" referred to it for venue. *The State v. Walls*, 54 Ind. 407.

4. It is claimed that there was no proper assignment of perjury; in other words, that if what the defendant was charged to have sworn to was untrue, still it could not have been perjury, because it was immaterial. The counsel for the appellee, as we understand his brief, argues that it was not material whether the road had been in use twenty years, because the use of a road by the public for a less period might constitute the road thus used a public highway, and he cites upon the point the following cases: *Fisher v. Hobbs*, 42 Ind. 276; *The City of Evansville v. Evans*, 37 Ind. 229. It may be conceded for the purposes of the case, that the right of the public to use land as a highway may be acquired by a user of less than

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twenty years. But this proposition in no manner affects the question which was involved in the proceeding before the board of commissioners. In other words, it does not show, that, in the proceeding before the board, it was not material whether the road had been used by the public for twenty years. The statute on which the proceeding before the board was based provides, that "All public highways which have been or may hereafter be used as such for twenty years or more, shall be deemed public highways, and the board of county commissioners shall have power to cause such of the roads used as highways as shall have been laid out, but not sufficiently described, and such as have been used for twenty years but not recorded, to be ascertained, described and entered of record." 1 R. S. 1876, p. 534, sec. 45.

The statute quoted provides for two classes of cases: First, roads used as highways which have been laid out but not sufficiently described. Such roads thus laid out and used need not have been used twenty years before the board can proceed to have them ascertained, described, etc. Second, highways that have been used as such for twenty years but not recorded. In cases of the second class, it is plain that before the board can proceed to have the road ascertained, described and entered of record, it must have been used for twenty years.

The case before the board was of the second class. There was no pretence in the petition that the road had ever been laid out, but the sole ground on which the action of the board was invoked was, that the road had been used twenty years. While the right of the public to use land as a highway may be acquired by less than twenty years' user, still the board of commissioners are not authorized to cause a road, used but not recorded, to be ascertained, described and entered of record, unless it has been used twenty years. The evidence was therefore material, and we think it was both competent and proper for the board to hear evidence upon the point.

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If the road had not been used twenty years, the prayer of the petition could not have been granted.

5. It is finally claimed that the board of commissioners had no jurisdiction of the matter in which the oath was administered, and therefore that perjury could not have been committed. This position is assumed, because the indictment does not show that there was notice or process served in the cause before the board. We pass over the question, whether, in case the law required notice or process in the cause, it would have been necessary that the indictment should have shown that such notice was given or process served.

We are of opinion, upon an examination of the statute, that no notice or process was necessary in the proceeding before the board. On an application for the location, vacation or change of a highway, notice must be given by publication in a newspaper, or by posting up notices; but we find no law requiring or providing for notice, in cases like that in which the perjury is alleged to have been committed. The law does not provide for notice in such cases, nor the manner of giving the same; and it seems to us that it was contemplated by the Legislature, that the board might exercise the power conferred by the statute set out above, without the publication of such notice as is required on applications to locate, vacate or change highways.

We have thus considered the objections made to the indictment, and are of opinion that they are not well taken; nor do we discover any other substantial objection to it. We are of opinion that the court erred in quashing it, and that the judgment should be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

 Winsett v. The State.

WINSETT v. THE STATE.

CRIMINAL LAW.—*New Trial.*—*Newly-Discovered Evidence.*—*Cumulative.*—A new trial will not be granted on account of newly-discovered evidence which is merely cumulative.

SAME.—*Prosecuting Attorney.*—*Witness.*—It is not the duty of a prosecuting attorney, engaged in the prosecution of a person charged with a crime, to produce at the trial all the witnesses present at the commission of the crime.

SAME.—*Jury.*—*Special Jury.*—Where, on the calling of a cause for trial, the regular jury of the term is out considering upon their verdict in another cause, which has been submitted to them, the court may, even over the objection of the defendant, empanel a special jury.

From the Wayne Circuit Court.

S. A. Forkner, for appellant.

H. U. Johnson, Prosecuting Attorney, and C. A. Buskirk, Attorney General, for the State.

Howk, J.—Appellant was indicted in the court below, for the sale, without license, of intoxicating liquor, in a less quantity than a quart. His motion to quash the indictment was overruled, and an exception was saved to this decision. Upon his arraignment, the appellant entered a plea of not guilty; and the issues thus joined were tried by a jury, in the court below, and a verdict was returned, finding the appellant guilty as charged, and assessing his fine at twenty dollars. Appellant's motion for a new trial was overruled, and his exception saved to this decision; and judgment was rendered on the verdict by the court below.

The appellant has assigned, in this court, the following alleged errors of the court below:

1st. In overruling his motion to quash the indictment; and,

2d. In overruling his motion for a new trial.

In appellant's argument of this cause, in this court, there is no allusion whatever to the first of these alleged errors; and we might, therefore, regard it as waived.

We have, however, examined the indictment, and are unable to find any objection thereto, which could be reached by appellant's motion to quash. And as no such objection has been pointed out to us, we conclude that no error was committed by the court below, in overruling the motion to quash the indictment.

In his motion for a new trial of this case, the appellant has assigned many causes for such new trial; but his learned attorney, in his argument in this court, has considered only two of these alleged causes for such new trial. In our opinion, we may, therefore, well conclude, that the appellant relies upon those two causes, to the exclusion of the others, for a reversal of the judgment of the court below. We will, for this reason, limit our consideration of this case to the same two causes for a new trial, to which appellant's attorney has especially directed our attention. The first of these two causes for a new trial was thus assigned in the appellant's motion:

"That the defendant has, since the verdict was returned, discovered new, competent and material evidence for him, which he could not, with reasonable diligence, have discovered and produced at the trial, which will be made to appear by the affidavits of the defendant and James Bennett, herewith filed."

As necessary to a proper understanding of the nature and intended use of this newly-discovered evidence, we will set out the evidence of the prosecuting witness, one Eli Griffith, on the trial of this cause, in the court below, as follows:

"My name is Eli Griffith. I reside in Milton, Wayne county, Indiana. I purchased a glass of whiskey of the defendant, James Winsett, at his saloon, at the American House, in the town of Milton, Wayne county, Indiana. I paid ten cents for the whiskey, and drank it on the premises where I bought it. I bought this liquor on the 15th day of November, 1875."

On cross-examination, this witness further testified, as

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township may employ a physician to attend upon paupers of his township requiring medical treatment, and the county is liable to such physician for the value of services rendered by him under such employment.

From the Franklin Circuit Court.

J. R. McMahan, T. H. Smith and F. Berry, for appellant.

F. S. Swift, for appellee.

Howk, J.—Appellant, as plaintiff, sued the appellee, as defendant, in the court below.

Appellant's complaint was in two paragraphs, to each of which paragraphs the appellee demurred, upon the ground that the facts stated therein were not sufficient to constitute a cause of action. These demurrers were sustained by the court below, and to these decisions the appellant excepted, and judgment was rendered on the demurrers, for the appellee.

The appellant has assigned in this court, as alleged errors, the decisions of the court below, in sustaining appellee's demurrers to each paragraph of his complaint. As these alleged errors call in question the sufficiency of the complaint, we will summarize, as briefly as we can, the facts stated in each paragraph.

In the first paragraph of his complaint, the appellant alleged, in substance, that he was, and had been for the last twenty years, a practising physician of Franklin county, Indiana; that the appellee was indebted to him in the sum of fifty-three dollars and fifty cents, for medicines furnished, and medical attention and services rendered, to certain persons named, at the instance and request, and under the direction and employment, of the trustee of Metamora township, in said county; that, at and during the time of furnishing said medicines and rendering said services, and at the date of the employment of the appellant by said trustee, the said persons named were paupers and a temporary charge upon said county, and *bona fide* residents and inhabitants of and in said Meta-

mora township; that during all of said time there was no physician in said county whose duty it was to attend on, and afford relief to, the paupers of said township, outside of the poor-house and jail of said county, and none of the paupers named were in the poor-house or jail of said county, during the time of appellant's attendance on them; a bill of particulars of said indebtedness was filed with and made part of the complaint; that said bill was duly presented to appellee, at its September term, 1875, for allowance and payment, but that appellee refused to allow and pay the same; and that said bill was then due and unpaid; wherefore, etc.

The second paragraph of the appellant's complaint contained all the allegations of the first paragraph, except the allegation that the bill had been presented to the appellee for payment, with the following additional averments: "That the physician, who had been employed by said board to attend on the paupers of said township, during said time, had left said county and abandoned his contract with said board to care and attend on the paupers of said township, and refused to perform said duty; and that there was no other physician or person whose duty it was to attend on and afford relief to the paupers of said township, who were not inmates of the poor-house or jail of said county."

A single question is presented for our consideration by the record of this cause, which question may be thus stated: Under the facts stated in either paragraph of appellant's complaint, was the trustee of Metamora township authorized by law to employ the appellant to attend as a physician on the paupers of said township, so as to render the appellee liable to the appellant for the payment of his services under such employment? We think this question must be answered in the affirmative, upon the facts stated in each paragraph of the complaint. The township trustee is by law the overseer of the poor

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which it certainly was not. In speaking of "newly-discovered evidence" as a cause for a new trial, it is said, that it must appear, "that the newly-discovered evidence is material to the issue, going to the merits of the cause, and is not merely cumulative, corroborative or collateral." Buskirk Practice, p. 241, and the authorities there cited

Our conclusion is, that the newly-discovered evidence contained in the affidavits in support of this cause for a new trial, from its nature and also from its manifestly intended use, did not constitute a good cause for a new trial of this case. In this connection, appellant's learned attorney has made the point in argument, and elaborately discussed it, that it is the duty of the State's attorney, in all criminal prosecutions, to produce at the trial "all the witnesses present at the transaction." It is evident, that this point was not made in the court below; and, therefore, we are not required to consider it. We may remark, however, that the law of this State, in our opinion, imposes no such duty on the State's attorney.

The second of the two causes for a new trial considered by appellant's counsel in his argument, in this court, is thus stated in the motion for such new trial:

"That the court erred in calling a jury from the bystanders, when the regular jury was in attendance at said term of court, to try said cause, over the objection of the defendant, and not allowing the defendant to be tried by the regular jury."

By the 3d section of "An act in relation to the order of business in the circuit courts, and giving the court the power to empanel special juries in certain cases," approved March 7th, 1873, it is provided, as follows:

"Sec. 3. The courts shall have the power, when the business thereof requires it, to order the empanelling of [a?] special jury for the trial of any cause." 2 R. S. 1876, p. 13.

In the case of *Evarts v. The State*, 48 Ind. 422, a case very similar to the one now before us, this section of the

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act of March 7th, 1873, was considered by this court, and it was there held, under its provisions, that where the regular jury were out considering upon their verdict in a cause submitted to them, the court might order the empanelling of a special jury, for the trial of another cause. It was shown by the record, in the case at bar, that when this cause was called for trial, in the court below, the regular jury were out considering upon their verdict in another case, and that the court was behind with its business for the term. Under these circumstances, it is very clear to our minds, that the court below did not err, in calling a jury from the bystanders, for the trial of this cause.

In conclusion, we hold that no error was committed by the court below, in overruling the appellant's motion for a new trial of this cause.

The judgment of the court below is affirmed, at appellant's costs.

O'DEA v. THE STATE.

CRIMINAL LAW.—New Trial.—Newly-Discovered Evidence.—An affidavit in support of a motion for a new trial, based upon the ground of alleged newly-discovered evidence, should show that due diligence had been used, before the trial, to discover and produce such evidence.

SAME.—Impeaching Evidence.—A new trial ought not to be granted on account of newly-discovered evidence which could be used only in impeaching a witness who is not a party to the action.

SAME.—Supreme Court.—Record.—Where the evidence given on the trial of a cause is not in the record on appeal to the Supreme Court, error assigned upon the action of the lower court in overruling a motion for a new trial, based upon the ground of alleged newly-discovered evidence, is not available.

LIQUOR LAW.—Constitutional Law.—Section 12 of the act of March 17th, 1875, (1 R. S. 1876, p. 869,) "to regulate and license the sale of" intoxicating liquors, is not unconstitutional.

57	31
137	60

57	31
169	193

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171	101

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From the Hendricks Circuit Court.

C. C. Nave and C. A. Nave, for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—Indictment against the appellant, for unlawfully selling a less quantity than a quart of intoxicating liquor to Taylor Dodson, without license. The indictment was found at the March term of the Hendricks Circuit Court, 1877, and the cause continued until the September term of the same year, at which term the appellant was tried, convicted and fined. He moved for a new trial, upon the ground of newly-discovered evidence.

Under the motion he filed several affidavits:

1. His own affidavit, in which he informs the court, that since his conviction "he has discovered material new evidence which he could not, by the exercise of reasonable care and diligence, have discovered and produced at the trial of said cause;" but he does not tell the court that he used any diligence whatever. He further informs the court that the newly-discovered evidence is contained in the following affidavits of Patrick Hughes and Thomas Feeney; and "that he fully believes the facts set forth in said affidavits are true."

2. The affidavit of Thomas Feeney, in which the affiant states: "That he was present at the store of Thomas O'Dea, in the town of Brownsburgh, in said county, on December 25th, 1876, during the entire day. That he was acting as clerk for said defendant. That he came to the store about six or seven o'clock A. M. of said day, and remained there during the entire day, except when said store was entirely closed to attend church. That Taylor Dodson, the prosecuting witness in this case, did not come into the store during the entire day. Affiant was so situated in the store, that, had said Dodson come into the store, he could not help but see him. This affiant further says, that he never called the attention of the above defendant to the facts above set forth, until since the trial was had in the above entitled cause."

But whether the conviction was had for a sale made on the 25th day of December, 1876, at the store of the appellant, we are nowhere in the case informed, the evidence not being in the record. And the fact that he had from the month of March to the month of September to ascertain these facts from his clerk, without succeeding in his purpose, does not favorably impress us with the activity of his diligence in preparing his defence to the indictment.

3. The affidavit of Patrick Hughes, who swears, "That on or about May 20th, 1877, he was at the store of John Hughes, at Pittsboro, in said county; that while there the prosecuting witness, Taylor Dodson, came into the store, and in a conversation which then took place between said Dodson and said John Hughes, he, said Dodson, stated and declared that he had never purchased any intoxicating liquors of said Thomas O'Dea, at any time; but that he procured this indictment against said O'Dea for the purpose of revenge for a certain difficulty that took place between him (Dodson), and the wife of O'Dea, which took place on Christmas, 1876. This affiant further says, that he never informed said defendant of the facts above set forth, until the 4th day of October, 1877."

4. Also the affidavit of Israel L. C. Bray, which is in substance the same as the affidavit of Patrick Hughes, except that it lays a different venue for the conversation with Dodson, and that he did not inform the appellant of the facts, until the 8th day of October, 1877.

This alleged newly-discovered evidence could be used only in impeaching a witness who is not a party to the suit. This is no ground for a new trial, as we have frequently decided. The evidence not being in the record, we can not say that what has been newly discovered would have had the least influence on the verdict; nor are we even informed that it was not produced and used at the trial, all of which should have been shown, to give

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force to the motion. *O'Brian v. The State*, 14 Ind. 469; *Cowden v. Wade*, 23 Ind. 471; *Larrimore v. Williams*, 30 Ind. 18; *Rickart v. Davis*, 42 Ind. 164; *Bartholomew v. Loy*, 44 Ind. 393; *Reno v. Robertson*, 48 Ind. 106; *Humphreys v. Klick*, 49 Ind. 189; *Kessler v. Leeds*, 51 Ind. 212; *Rainey v. The State*, 53 Ind. 278; *Rains v. Ballow*, 54 Ind. 79.

The appellant also moved in arrest of judgment. In support of this motion it is urged in his behalf, that the act under which the indictment was found is unconstitutional, because the subject of it is not properly expressed in the title. We think it is. So far as the section under which this indictment is prosecuted, the present act and other similar acts have so frequently been held constitutional by this court, that we must regard the question settled.

The judgment is affirmed, with costs.

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132	211

MARTIN v. MERRITT.

SUPREME COURT.—*Practice.*—*Pleading.*—*Demurrer.*—*Harmless Error.*—Error in sustaining a demurrer to a paragraph of a pleading is not available on appeal to the Supreme Court, where the matter therein alleged was admissible and admitted in evidence, on the trial of the cause, under a remaining paragraph.

SPECIFIC PERFORMANCE.—*Vendor and Purchaser.*—*Action by Vendor.*—*Pleading.*—*Tender.*—*Contract.*—In an action by the purchaser, against the vendor, to enforce specific performance of a contract for the sale and conveyance of real estate, the complaint need not aver a tender of performance by the plaintiff, if there be an averment therein that the defendant had expressly repudiated the contract, and notified the purchaser that all tender upon his part was waived by the vendor.

SAME.—*Husband and Wife.*—*Wife's Refusal to Convey.*—*Decree of Performance.*—*Abatement of Price.*—*Wife's Interest.*—In an action against a husband and wife, to enforce specific performance of a contract for the sale and conveyance of his real estate, executed by them to the plaintiff, if the

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wife avail herself of her coverture by plea, a decree of performance may nevertheless be rendered against the husband, conditioned, that, if the wife join in such conveyance, the plaintiff shall pay the full contract price therefor, but that otherwise such payment shall be abated to the amount of the ascertained value of the wife's inchoate interest in such real estate.

SAME.—Dower.—Evidence.—Where, in such case, the evidence and finding are as to the value of her inchoate right of dower, the defendant can not complain of an abatement equal to such value.

SAME.—Deferred Payments.—Promissory Note.—Where such contract provides generally for deferred payments of portions of the purchase-money, the vendor can not demand the execution of promissory notes therefor, payable in bank.

SAME.—Purchaser's Option.—How Declared.—Where such contract provides that the purchaser may accept the same within a specified time, at his option, an endorsement on the contract, executed by him, that he has accepted the real estate on the terms proposed, is a valid declaration of his option.

From the Marion Circuit Court.

L. Barbour and C. P. Jacobs, for appellant.

B. K. Elliott, B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

PERKINS, C. J.—Complaint by appellee, against appellant, for a specific performance of the agreement copied below.

The complaint contains an accurate description of the property, alleges performance, and offers of performance, tender, etc., and refusal on the part of appellant, showing a right, on the part of the appellee, to the relief demanded. Answers were filed, issues made, a trial had, and a decree in favor of appellee was rendered. Appellant's wife was made a defendant to the suit, but went out of the case on an answer of coverture.

The following are the contracts:

“EXHIBIT A.

“INDIANAPOLIS, Feb'y 2d, 1872.

“This agreement, made this 2d day of Feb'y, 1872, between John H. Martin and wife, of the first part, and Geo. Merritt, of the second part, Witnesseth; that John

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H. Martin and wife agree to sell to Geo. Merritt the farm he now lives on and owns in Centre Township, Marion County, Indiana, about thirty-three acres, more or less, for the sum of twelve thousand dollars, to be paid as follows: Three thousand dollars to be paid at the time this agreement is accepted by the said Geo. Merritt, and three thousand dollars a year, each year thereafter, until the whole twelve thousand dollars is paid, with interest at the rate of six per cent. per annum, on the deferred payments. This agreement to be binding for twenty days, said Geo. Merritt to have the option to the farm, at the price and terms named, at any time within twenty days from this date. But it is also agreed by said George Merritt, that if he shall take the farm at the price named, said J. H. Martin shall have the privilege of occupying house and out-houses and barn on said farm, and so much of the garden and orchard of the farm as he may need for his family, and pasture for his stock, until September 1st, 1872, by paying said Geo. Merritt a reasonable rent for such property, and it is further agreed, that if said J. H. Martin shall decide to give possession of the property on the 1st of April next, said Geo. Merritt agrees to take the lease which said J. H. Martin now holds on the farm now known as the Thomas & Cox farm, and assume all liabilities of the same, as said Martin now holds, and pay said Martin one hundred and fifty dollars for the same, said transfer of lease to be at the option of said J. H. Martin, for twenty days from this date. If said Geo. Merritt shall take the farm in accordance with the terms of this agreement, said J. H. Martin and wife agree to make him a good and sufficient warranty deed to the property, without unnecessary delay, and he further agrees to pay the taxes for 1871; Geo. Merritt to pay the taxes for 1872. It is further agreed, that said Geo. Merritt shall have the privilege of entering upon the premises named, at any time after he accepts this proposition, to make any im-

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provements in the way of building or change of fences, for street or other purposes, that he may choose.

(Signed.)

"JOHN H. MARTIN,
"HARRIET MARTIN,
"GEO. MERRITT."

"EXHIBIT B.

"This proposition is extended for ten days after the expiration of the first twenty days mentioned therein. Feb'y 19th, 1872.

(Signed.)

"JOHN H. MARTIN,
"HARRIET MARTIN,
"GEORGE MERRITT."

"EXHIBIT C.

"I have agreed to take the farm on the terms proposed, this 2d of March, 1872.

(Signed.)

"GEO. MERRITT,
"JOHN H. MARTIN."

No demurrer was filed to the complaint.

The appellant answered in three paragraphs:

First. The general denial.

The second alleged a withdrawal of the proposition. A demurrer was sustained to it, and it went out of the case.

The third alleges that said pretended agreements were but one and the same; that the first was but a mere proposition for sale, and could be withdrawn at any time before acceptance by appellee; that before it was accepted by appellee, it was varied by parol, so as to give appellant the option of selling but a part of said farm; the terms of payment changed, and the time for accepting the contract as changed extended for ten days; appellant further says, he was ready and offered to fulfil the contract, and perform the same according to the terms of the parol modification, but appellee refused, etc.; that afterward, on account of the said action of the appellee, said Harriet determined to have no further participation in the sale, etc.

A demurrer was overruled to this paragraph of answer.

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The appellee replied in three paragraphs:

First. The general denial.

Second. That the propositions were not withdrawn, as alleged in said paragraphs, nor such new agreements, as therein alleged, made.

The third paragraph of reply was this:

"That the agreements in the complaint set out are not one and the same agreement, and that the agreement dated February 2d, 1872, is the first agreement made between the parties; that the agreement dated February 19th, 1872, was made on that date; and on the 2d day of March, 1872, the agreement bearing that date was made and signed by the parties. That at the time of the execution of the last mentioned agreement, to wit, that set out in the complaint as 'Exhibit C,' the entire transaction between the said parties was fully agreed upon as evidenced by the said written agreement.

"That prior thereto the plaintiff had agreed with the defendants to take the real estate in said several agreements mentioned, and had so notified the said defendants, and had duly offered to perform his part of the said contract.

"That the said parties, in evidence of the acceptance and completion of the agreements between them, did both sign and execute the aforesaid agreement of March 2d, 1872, and that prior thereto there was no withdrawal of the written propositions theretofore made by the said defendants.

"The plaintiff further avers, that the only agreement existing between the parties to this action, or at any time executed by them, was and is that contained in the said several written agreements hereinbefore mentioned; and that the said last mentioned written agreement, to wit, that of March 2d, 1872, was executed in consideration of the promises and undertakings in the first agreement, to wit, that of February 2d, 1872, by the defendants made, and that it was executed for the purpose of

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completing a written contract of, and covering the matters agreed upon and mentioned in the said first written, agreement, and for no other purpose, and upon no other consideration."

The pleadings set forth above present the issues upon which the cause was tried, and the decree therein rendered.

As above stated, a demurrer was sustained to the second paragraph of answer, and exception was taken.

Error is assigned upon this ruling on the demurrer.

Of the ruling upon the demurrer to this paragraph of answer, counsel say:

"The demurrer to the answer would go back to the complaint, and we think the complaint was clearly bad for not offering a tender of the first payment without demanding a deed. The first payment and the execution of a deed are not made concurrent acts by the agreement. The purchaser was bound to make the first payment without a deed, but he made no such offer. Hence, the complaint is bad."

But if the complaint does not aver a tender, it shows a sufficient excuse for not making it. We copy a statement: "The plaintiff shows, that at all times he has been ready and willing to perform his part of the said contract, and that he, at divers times, both prior and subsequent to the 2d day of March, 1872, so notified the defendants; and that subsequently to the said 2d day of March, 1872, the defendants did expressly notify the plaintiff that they waived all tenders upon the part of the plaintiff; and did expressly inform the plaintiff that they would refuse to execute any deed, and that they would not perform their part of said agreement." And as to the paragraph of the answer as a defence, we think all evidence that could have been given under it would have been admissible under the other paragraphs of answer, and was, in fact, so far as it existed, admitted. The error, if

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error it was, in ruling upon this paragraph of answer, was a harmless one.

The remaining error assigned is, the overruling of the motion for a new trial.

As has already been stated, this was a suit brought by George Merritt, the appellee, against John H. Martin and Harriet Martin, his wife, to enforce specific performance of a contract in writing to convey real estate. There was judgment in favor of Harriet Martin, on her answer of coverture, a trial by the court, and a finding for plaintiff, and a decree that defendant John H. Martin should "make, execute, acknowledge, and deliver to plaintiff a good and sufficient warranty deed for the said real estate." And if the said Harriet, the wife of defendant John, should sign the deed also, then the full sum of twelve thousand dollars, as called for in the contract, should be paid over to defendant John, but if the said Harriet should refuse to sign the deed, then two thousand eight hundred dollars should be deducted from the contract price.

On the trial, the court permitted proof by the testimony of an expert, in connection with standard tables, of the present value of the inchoate right of dower of Harriet Martin. The appellant excepted, and made this action of the court one of the grounds upon which he moved for a new trial. This ruling and exception raise the main question in the cause; for the reason that the appellant insists it was not a fact legally provable on the trial. He takes the position, that, because of the refusal of the wife to join in the execution of the contract, no specific performance could be had against the husband; and, therefore, that the action of the court was fundamentally wrong.

On this point, the decisions in this State are against the appellant: *Wilson v. Brumfield*, 8 Blackf. 146; *Wingate v. Hamilton*, 7 Ind. 73; *Hazelrig v. Hutson*, 18 Ind. 481; *Baker v. Railsback*, 4 Ind. 533. And we think these

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decisions are sustained by the weight of authority elsewhere. *Park v. Johnson*, 4 Allen, 259; *Presser v. Hildenbrand*, 23 Iowa, 488; *Wright v. Young*, 6 Wis. 127; *Sanborn v. Nockin*, 20 Minn. 178.

But it is insisted, that if there be a general rule that specific performance may be decreed as to a part, with an abatement or compensation for the deficiency, the rule does not embrace cases where the interest that can not be conveyed is an inchoate dower right.

As matter of fact, we find the rule is applied in such cases. *Wright v. Young*, 6 Wis. 127; *Park v. Johnson*, 4 Allen, 259; *Presser v. Hildenbrand*, 23 Iowa, 488.

But, in this State, dower is abolished, and in place of dower our statute substitutes a fee, so that, in this State, an inchoate right to one-third in fee takes the place of the common-law inchoate right to a life-estate in one-third of the realty. The inchoate right to a third in fee is of more value than the inchoate right to dower. But abatement was made in this case of the value of a dower right, so that the error was in favor of the appellant.

A question is made as to whether, under the contract, the purchaser was bound to give commercial paper (notes payable in bank) for deferred payments. We are clear that he was not.

On the evidence, we think the decree rendered is in accordance with its weight. The endorsement on the agreement, March 2d, was the declaration of option by Merritt, under the original agreement. The abatement made for the interest of the wife was less than one-fourth of the contract price. The ages of Martin and wife are these: He is fifty-nine, and she is thirty-nine.

Judgment affirmed, with costs.

Petition for a rehearing overruled.

Hankins, Adm'r, v. Kimball.

HANKINS, ADMINISTRATOR, v. KIMBALL.

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DECEDENTS' ESTATES.—*Real Estate.*—*Executor and Administrator.*—*Descents.*

—*Wills.*—As a general rule, real estate, on the death of the owner, passes to the heir or devisee, and the administrator or executor has no power over it, except that given by the statute or the will.

SAME.—*Conveyance by Executor.*—*Release.*—*Tort.*—*Railroad Company.*—*Action by Devisee against Executor.*—An executor has no power, as such, to execute to a railroad company a release to a right of way over lands belonging to his testator's estate, and can not be held liable, as such, for money received by him for such release, in an action against him by the devisee.

SAME.—*Assets.*—Money so received by an executor is no part of the assets of such estate.

From the Fayette Circuit Court.

J. C. McIntosh, for appellant.

B. F. Claypool, for appellee.

PERKINS, C. J.—Suit by the appellee, against the appellant, upon a cause of action growing out, in a measure, as is claimed, of the last will of Daniel Hankins, deceased. We give so much of the will as bears upon the questions arising in this case.

The first item of the will gives directions as to the funeral of the testator.

The second directs the payment of his debts.

The third gives a life-estate in a farm to his granddaughter Amanda Brumfield.

This is the fourth: "It is my desire, that, should my granddaughter Ida Kimball live until she arrives at the age of eighteen years, thenceforward, as long as she may live, she do have the exclusive use and profits, after deducting taxes, costs of repairs and improvements proper with the management of the same, of the following described farm," describing it; "and upon her death leaving issue of her body, it is my desire that such issue do inherit said farm, with the privileges, etc., in fee-simple, absolutely, after the manner of the law regulating descents in said State. Should she, however, die without leaving issue, in that

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event, it is my desire that the said farm do pass into the residuum of my estate, to be disposed of as is provided herein in that behalf. And this provision for my said granddaughter Ida, in addition to what I have done, and may yet do and provide, for her in person during my life, in and about her education, maintenance and support, it is my will shall be in full of the share of herself and heirs in my estate."

The fifth item is immaterial in this suit. It explains why he leaves his wife to take the share in his estate which the law gives her.

This is the sixth: "Should my said granddaughters, or either of them, not find it agreeable to reside on the farm set apart for each respectively, or in said county of Fayette, it is my desire that some suitable person be appointed by the proper court of said county, to have the management of the proper farm or farms, and it is my desire that such manager, after paying the proper taxes and costs of repairs, improvements and management, do annually, or oftener as convenient, pay over the net balance to the proper person entitled thereto, taking proper vouchers, and making reports to said court as in the case of a guardian of a minor's real estate. And should either of said farms be managed by the person for whose use it is set apart, directly or indirectly, and should the proper payment of taxes thereon be neglected, so that penalty be incurred, or should waste be wilfully committed or suffered thereon, affidavit of either of said facts being made in good faith, by any person interested in the residuum of my estate, in that case the person so neglecting, committing or suffering, shall thence forever be deprived of the right to reside upon, or have the management of, such farm, taking thereafter only the net profits thereof, as above provided."

The seventh item provides that the balance of his estate, after the provisions made for his two granddaugh-

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ters, shall go according to the law of descent; and the eighth appoints an executor.

At the death of the testator, Daniel Hankins, his granddaughter Ida had not arrived at the age of eighteen years, and the executor of Hankins took possession of the farm devised to her, as mentioned in the will. While he was so in possession, and before Ida had come to the age of eighteen, a railroad, now The Fort Wayne, Muncie and Cincinnati Railroad, was located through this farm, on a strip thirty feet wide, for the release to the right of way upon which the said railroad company paid the executor three hundred dollars, and he received fifty-four dollars, in addition, for wood taken from the strip. These moneys were all received by the executor, and mingled with the assets of the estate.

This suit is prosecuted by Ida, to recover from the executor, as such, said sum of three hundred and fifty-four dollars. The court gave her judgment for interest upon three hundred of it for five years, that is, from the 12th day of November, 1870.

We should here state that a demurrer to the complaint was overruled, and exception taken. This ruling, among others, is assigned for error in this court. It appears that the executor released the right of way over the land above mentioned, and received the money of the railroad company in compensation therefor, without authority. Neither the law, nor the heirs, nor the devisee gave him power to do the act. *Boynton v. Peterborough, etc., R. R. Co.*, 4 Cush. 467, is in point. It is there decided, that, "where the land of one deceased is taken for a railroad, the heir and not the administrator is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator has previously represented the estate to be insolvent, and afterwards obtained a license to sell the intestate's real estate for the payment of debts;" and, further, that the

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damages could not be received by the administrator and administered as assets of the estate.

In *Lucy v. Lucy*, 55 N. H. 9, it was held, that the real estate of a decedent vests at once in the heir or devisee; that the administrator can not lawfully take the rents and profits; and that, "in such case, if the administrator has received the rents and profits, he is not to be charged with them in his administration account, but is liable to account to the heirs for the same."

In *Haslage v. Krugh*, 25 Pa. State, 97, it was held, that a lease given by an administrator of land of the decedent was void, and that rents received by him on the lease were not part of the assets of the estate, and that the sureties on his administration bond, therefore, were not liable for them, if wasted by the administrator. See additional cases to the same effect in 2 Williams on Executors, p. 893, 6th Am. ed., notes.

These decisions harmonize with the provisions of our own statute on the subject of decedents' estates and the administration thereof. By those, the executor or administrator inventories the personal estate, and such real estate as is devised to pay debts and legacies and directed by the will to be sold for that purpose and nothing else; these alone are appraised; to these alone, the power of administration extends; and the administration bond covers the acts of administration, as to these alone. Where the executor or administrator assumes to act outside of his power under the law, he is a wrong-doer, and personally responsible, in his natural capacity, to parties injured.

As a general rule, as we have seen, land, on the death of the ancestor, passes to the heir or devisee, and the administrator or executor has no power over it, except what may be given by the statute or the will. He can not, in the absence of authority, take in nor pay out money from it, as administrator; for if he can, he can waste it as administrator, and render the sureties on his bond

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liable for it. And it would enable an executor or administrator very indefinitely to augment estates, if he could take, in his capacity as such, all the property he could get hold of belonging to third persons, and pay it in as part of the assets to be administered.

Who, besides the first wrong-doer, may be liable for such property, we do not inquire. If we are right in the view we have taken, this case falls directly within that of *Rodman v. Rodman*, 54 Ind. 444, which decides that an action like the present, upon the facts appearing in it, can not be maintained against an executor or administrator as such.

We need examine no other question in the cause.

The judgment is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

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132	321
133	251
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136	290
57	46
154	658

BINNS v. THE STATE.

CRIMINAL LAW.—Evidence.—Declarations.—Hearsay.—Declarations which form a part of the *res gesta*, and are to be regarded as a part of the transaction in question, do not come under the head of hearsay, but are admissible as original evidence.

SAME.—A declaration which is simply narrative of a past event, depending solely, for its effect, upon the credit of the person making it, and not so connected with the transaction in question as to illustrate its character, is inadmissible in evidence.

SAME.—Murder.—Declarations of Deceased.—On the trial of a defendant indicted for murder, declarations of the deceased, made in the absence of the defendant and after the infliction of the injury, subsequently resulting in death, as to the manner in which, and the means by which, such injury was inflicted, are not admissible as evidence against the defendant.

SAME.—Motive.—Where, in such case, the defendant was on trial for the alleged murder of his wife, it is not competent, as tending to establish a motive for the commission of the murder, to introduce in evidence the record of a decree of a court, in an action by the deceased, against the defendant, for a divorce, ordering the latter to pay money into court, restraining him from selling his property, appointing a receiver, etc.

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SAME—Parol Evidence of Pendency of Suit.—In such case, as tending to show the state of feeling between the defendant and the deceased, parol evidence of the pendency of such suit may be given.

From the Clinton Circuit Court.

L. McClurg, J. V. Kent, S. M. Shepherd and Gordon, Browne & Lamb, for appellant.

J. F. Vail, Prosecuting Attorney, *C. A. Buskirk*, Attorney General, *N. R. Lindsay* and *J. F. Elliott*, for the State.

WORDEN, J.—Indictment for murder, conviction, and sentence of imprisonment in the state-prison for life, a new trial having been refused.

This is the third time the case has been in this court, the judgments on former convictions having been reversed. *Binns v. The State*, 38 Ind. 277; S. C., 46 Ind. 311.

Rachel Binns, the wife of the appellant, was the person charged to have been murdered. The evidence tended to show that she was shot and mortally wounded, on the night of January 31st, 1870, in Russiaville, in Howard county, Indiana.

It may be observed that the indictment was returned in Howard, but sent on change of venue to Clinton county for trial.

On the trial, the State called Dr. William H. Hornaday as a witness, and proved by him that he lived in Russiaville in January and February, 1870; that he was acquainted with Mrs. Binns; that he remembered the circumstance of her being shot. In answer to a question as to the first intelligence he received of the occurrence, he said:

"I had gone to bed, about nine in the evening; was lying down in the front room of my house, and heard a scream as though in distress. As soon as I could get on my boots (without my socks), pants, coat and vest, I ran to the house of Mrs. Binns, and found her there shot."

In answer to a question, he said that Mr. Cooper and

Binns v. The State.

Robert Shilling were in the house immediately before him. He also said that he did not hear the report of the fire-arm.

In answer to a question as to the time which elapsed between the screaming and his arrival at the house, he said: "Well, I don't know; I can not say just how long it would take me to run that distance; not more than a minute and a half or two minutes. I lived about three hundred yards from the house."

The witness found the deceased standing on the floor in the room when he went in; she seemed to be considerably distressed and excited; she was crying, and proceeded to tell those present the occurrence. The witness was asked to state what she said in regard to her wound, the manner, and her position when she was shot. To this the defendant objected, on the ground that her statements then made were no part of the *res gestæ*; but the objection was overruled, and he excepted. The witness proceeded to state as follows:

"Well, she said she was stooping down, putting wood in the stove at the time of the occurrence, and the shot came from the outside through the window, and she was stooping down, fronting the window immediately fronting the stove at the time of the occurrence."

It is a well-established principle of law, that declarations which form a part of the *res gestæ*, and are to be regarded as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence. But the application of the principle is sometimes attended with doubt and difficulty. It was said in the case of *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36, that "If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect upon the credit of the person making it, it is not admissible in evidence. Such a declaration would be hearsay. As where the holder of a check went into a bank, and, when he came out, said

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he had demanded its payment; this declaration was held inadmissible to prove a demand, as being no part of the *res gestæ*. This statement was mere narrative, wholly detached from the act of demanding payment, which was the fact to be proved."

It was also said in the same case, that "declarations, to be admissible, must be contemporaneous with the main fact or transaction; but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate and conflict of opinion in regard to this particular point."

Mr. Greenleaf says (1 Greenl. Ev., sec. 108): "The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." And again, at sec. 110: "It is to be observed, that, where declarations offered in evidence are merely narrative of a past occurrence, they can not be received as proof of the existence of such occurrence."

Turning to a valuable English work, we find it stated, that "In all these cases the principal points of attention are, whether the *circumstances* and *declarations* offered in proof were *so connected with the main fact* under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was at one time thought necessary that they should be *contemporaneous* with it; but this doctrine has of late years been rejected, and it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential. * * * Still, an act can not be varied, qualified, or explained, either by a declaration which amounts to no more than a mere *narrative of a past occurrence*, or by an *isolated* conversation held,

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or an isolated act done, at a later period." 1 Taylor Ev., secs. 525-526.

Now, the statements of Mrs. Binns must have been made some time after the shooting was done, assuming, as we think we may, that it was done before the witness heard her screams. A sufficient time elapsed to enable the witness to put on the clothing mentioned by him, and to go about three hundred yards to the house of the deceased. Her statements, it seems to us, were purely a narrative of what had taken place. She stated her position at the time of the occurrence, and that the shot came from the outside through the window.

This was simply the narrative of a past event, depending solely, for its effect, upon the credit of the party making it, and not so connected with the main fact, the shooting, as to illustrate its character.

We think the weight of authority is against the admissibility of the evidence. In addition to the authorities above cited, we may note the following cases:

In *Scaggs v. The State*; 8 Sm. & M. 722, which was a case of murder, the accused was seen by a witness on the day of the murder, with blood on his hands, to which he called the attention of the witness. The accused proposed to prove what he said to the witness when he showed the blood upon his hands, but it was held incompetent.

In *Denton v. The State*, 1 Swan, 279, Denton was indicted for the murder of Sullivan, and was convicted of manslaughter. It appeared on the trial that Denton and Sullivan quarrelled, and a blow was struck, when they were separated. Denton then got hold of a chair and threw it at Sullivan, but the witness did not see whether it hit him or not. Sullivan was then pushed out of the house, and, while out, went round the house. In twenty-five or thirty minutes he returned and complained of being sick and was put to bed. The Attorney General asked the witness what Sullivan then said about what made him sick, and whether or not he said that Denton

had hit him. Objection to this question was overruled, and the witness stated that Sullivan said "Denton had hit him in the belly"—"that Denton had bursted him open with the chair." This evidence was held incompetent, and the judgment was reversed.

In the *State v. Tilly*, 3 Ire. 424, it was held not competent for a prisoner indicted for murder, to give in evidence his own account of the transaction related immediately after it occurred, though no third person was present when the homicide was committed. In *Bland v. The State*, 2 Ind. 608, the case in Iredell was followed, and it was held not competent for the accused to prove a statement made by himself half an hour after the homicide, concerning the circumstances under which it was committed. See, also, *Dukes v. The State*, 11 Ind: 557.

We are aware that the cases of *Commonwealth v. M'Pike*, 3 Cush. 181, and *Commonwealth v. Hackett*, 2 Allen, 136, go far to sustain the admission of the evidence, but we are of opinion, as before stated, that its admission was against the weight of authority.

We can not say that the evidence did not operate to the injury of the defendant.

The State also offered and gave in evidence, over due objection and exception thereto, parts of the record of an action for divorce by the deceased, against the appellant, in the Cass Circuit Court. The complaint in the action was omitted, but the orders of the court for the payment of money by the defendant, restraining the transfer of property, the appointment of a receiver, etc., were given in evidence. On a former trial of the cause, the whole of the record was given in evidence, and this was one of the grounds on which the judgment was reversed. *Binns v. The State*, 46 Ind. 311.

We are of opinion that the parts of the record given in evidence were irrelevant and incompetent. The orders of the court in that suit could have had no bearing upon the alleged murder. We do not see how they could legit-

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Conway.

imately have shown a motive for the commission of the murder. It may have been competent to show the state of feeling between the parties, and for this purpose it may have been competent to show that a lawsuit was pending between them. *The State v. Zellers*, 2 Halst. 220; *Monroe v. The State*, 5 Ga. 85. But the mere fact of the pendency of the suit might have been proved by parol. *Stanley v. Sutherland*, 54 Ind. 339-353.

The contents of the record given in evidence could have served no legitimate purpose in the prosecution, but may have injured the defendant, and we think the court erred in admitting them.

There are other grounds urged for a reversal of the judgment, but we pass them over, as the questions may not arise upon another trial of the cause.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the proper notice.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS R. W. Co. v.
CONWAY.

PRACTICE.—Evidence.—Order of Introducing.—Foreign Judgment.—Statute of Foreign State.—On the trial in the circuit court of an action upon an account, commenced before a justice of the peace, the defendant, on the close of the plaintiff's evidence in chief, offered in evidence a transcript of garnishment proceedings before a justice of the peace of a foreign state, showing a judgment against the defendant at the suit of a creditor of the plaintiff, and that the amount thereof had been paid into court by the defendant, appropriated, etc., but, on objection, it was unconditionally excluded.

Held, that such ruling was erroneous.

Held, also, that the evidence should have been admitted, upon condition that proof would be introduced that the law of such state conferred upon the justice jurisdiction to render such judgment.

From the Pulaski Circuit Court.

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Conway.

N. O. Ross, for appellant.

W. Spangler, for appellee.

PERKINS, C. J.—Suit commenced before a justice of the peace, by Conway against appellant, upon an account for work and labor done.

Judgment before the justice for Conway.

Appeal to the circuit court.

On the trial in the circuit court, after the plaintiff had closed his evidence, the defendant offered in evidence a transcript of garnishment proceedings, before a justice of the peace, in the State of Ohio, which showed a judgment in garnishment against the appellant at the suit of a creditor of Conway, for twenty-five dollars, and that the judgment had been paid into court, appropriated, etc.

The defendant objected to the admission of this transcript in evidence, but stated no ground of objection. The court refused to allow the transcript to go in evidence, without giving any reason for its ruling. Counsel for the appellee justifies, in this court, the ruling below, on the ground that the appellee should have first proved the law of Ohio, empowering justices of the peace to render such judgments as that, the transcript of which was offered in evidence. If this ground of objection had been stated below, the defendant might have obviated the objection at once, of his own volition. But it was not necessary, as a rule of practice, that the defendant should first prove the law of Ohio.

The rule of practice is, that a party may introduce his items of evidence in the order he pleases; but the court may, in its discretion, vary this rule as to an item in a given case. *Nordyke v. Shearon*, 12 Ind. 346; *Goings v. Chapman*, 18 Ind. 194.

But the court alone has power to compel a variation; and it should not do it at such time and in such manner as to take a party by surprise. It is conceded that the evidence offered was not *per se* incompetent, and that it was relevant to the issue, and there is nothing showing

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that the party was not ready, and intending to follow up the admission of the transcript, with an offer of the statute of Ohio showing jurisdiction. We think the court should not have made its ruling, under the circumstances, absolute in the first instance, but only temporary, or conditional that the transcript be excluded till, or unless, the party proved the law of Ohio, the court not having previously ascertained from the party, that he could not or would not make such proof.

We think the court erred in refusing unconditionally to admit the transcript.

This ruling was made the ground of a motion for a new trial, the overruling of which is assigned for error in this court.

The judgment is reversed, with costs, and the cause remanded for a new trial.

 DAVIS v. BARGER.

CONTRACT.—Sunday.—Common Law.—Contracts made on Sunday in this State are void, not at common law, but because they are in violation of a penal statute of this State.

SAME.—Promissory Note.—Pleading.—To an action by the payee, against the maker, on a promissory note, an answer, alleging the signing and delivery of the same, on Sunday, to a third person or to a co-maker, and averring it to be therefore void, is sufficient.

SAME.—Principal and Agent.—Implied Authority.—Such signing and delivery on Sunday carry with it no implied authority to the person to whom it is entrusted, to deliver the same to the payee.

SAME.—Express Authority.—Such signing and delivery on Sunday render the instrument void, though then entrusted to another with instructions to deliver it to the payee on a business day.

From the Bartholomew Circuit Court.

W. R. Keyes, W. W. Herrod and F. Winter, for appellant.

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W. F. Norton, for appellee.

BIDDLE, J.—Complaint on a promissory note, by James S. Barger, the payee, against Jacob Davis and Joel S. Davis, makers.

Jacob Davis, the principal in the note, suffered a default.

Joel S. Davis, the surety of Jacob Davis, answered :

First. "For separate answer herein, the defendant Joel S. Davis says he did not execute the note in suit on the 25th of December, 1873, the day it bears date, but that he signed said note and delivered the same to one John Davis, on the — day of ———, 187 , which said day was the first day of the week, commonly called Sunday, and not on any other or different day, and he says such signing and delivery were the only acts done by him at any time in the execution of said note."

Third. "For further separate answer, said defendant says he did not execute the note in suit on the 25th day of December, 1873, the day it bears date, but that he signed said note and delivered the same to his codefendant, Jacob Davis, on the — day of ———, 187 , which said day was the first day of the week, commonly called Sunday, and not on any other or different day, and he says such signing and delivery were the only acts done by him, at any time, in the execution of said note."

These paragraphs of answer were each held insufficient, on separate demurrers, alleging as ground the insufficiency of the facts stated, and the rulings on these demurrers present the only questions in the case.

Contracts made on Sunday are void, not at the common law, but because they are against a penal statute. *Perkins v. Jones*, 26 Ind. 499; *Reynolds v. Stevenson*, 4 Ind. 619; *Link v. Clemmens*, 7 Blackf. 479.

We think the court erred, in holding the separate paragraphs of answer by Joel S. Davis insufficient. The signing and delivery of the note by Joel S. Davis to a third person, or to a co-maker, did not make the contract

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as to him. It required a delivery to the payee to complete the execution of the note. The facts set up in each paragraph of Joel S. Davis' answer show that no such delivery was ever made by him, or with his consent. It can not be said that the delivery of the note by Joel S. Davis to a third person, or to a co-maker, on Sunday, carried with it the implied authority that such third person or co-maker might deliver it to the payee, as, perhaps, it would if so delivered on a business day, because, if Joel S. Davis had so delivered the note to a third person, or to a co-maker, on Sunday, with the express authority to deliver it to the payee on a business day, the act, having been done on Sunday, would have been void. Where an express authority is insufficient to authorize an act, no implied authority can arise.

The judgment against Joel S. Davis is reversed, at the costs of the appellee, and the cause remanded, with instructions to overrule the demurrers to the separate paragraphs of the answer of Joel S. Davis, and for further proceedings.

PRESSLER V. TURNER ET AL.

JUSTICE OF THE PEACE.—*Court of Record.*—The court of a justice of the peace in this State is a court of record.

SAME.—*Judgment.*—*Process.*—*Service.*—*Promissory Note.*—*Former Adjudication.*—A judgment, unappealed from, rendered in an action on a promissory note, by a justice of the peace having jurisdiction of the subject-matter and parties, where the constable's return on the summons issued to the defendant shows, that, more than three days prior to the rendition of judgment, it had been "served by reading," is binding on the parties thereto, is conclusive evidence of the facts therein set forth, can not be impeached or contradicted in a collateral proceeding, and will support an answer of former adjudication, pleaded to a subsequent complaint on the same cause of action, by and against the same parties.

SAME.—Where a judgment has been so rendered, the plaintiff, alleging such

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process to have been insufficient, can not treat such judgment as void, and maintain another action against the same parties, on such note.

SAME.—Principal and Surety.—Where such cause of action has been once so recovered upon, against two or more makers, the latter, in a subsequent action thereon, against them, by the same plaintiff, can not plead or try the question of suretyship.

From the Huntington Circuit Court.

B. M. Cobb, for appellant.

J. C. Branyan and *C. W. Watkins*, for appellees.

Howk, J.—In this action, the appellant, as plaintiff, sued the appellees, as defendants, in the court below, upon a promissory note, of which the following is a copy:

“Oct. 26, 1872. Ten months after date, we promise to pay to the order of James K. Pressler the sum of one hundred and forty dollars, value received, without any relief from valuation or appraisement laws, with ten per cent. interest after maturity.

(Signed.)

“ELIHU TURNER,

“WILLIAM H. EWING.”

The complaint alleged that the note was due and unpaid, and judgment was demanded for five hundred dollars.

The appellees jointly answered the complaint and said, in substance, that they admitted the execution of the note sued on, and they alleged, that on the 20th day of April, 1874, the appellant sued the appellees, on said note, before justice of the peace Lindsey N. Hollowell, Esq., in Polk township, of Huntington county, Indiana, both appellees being within his jurisdiction, and on the 27th day of April, 1874, appellant obtained a judgment on said note, before said justice of the peace, for one hundred and forty-eight dollars and thirty-six cents, and costs, and that neither of the appellees appealed therefrom; and that said judgment was still unsatisfied; and a copy of said judgment was filed with and made part of said answer; wherefore appellees prayed judgment for costs.

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And the appellee William H. Ewing separately answered the complaint and said, in substance, that he admitted his execution of the note sued on, but said that he was only surety on said note for his co-appellee; that the appellant released said appellee Ewing from all liability on said note, and took a separate judgment thereon, against his co-appellee, Turner, on the 27th day of April, 1874, before Lindsey N. Hollowell, Esq., justice of the peace, for one hundred and forty-eight dollars and thirty-six cents, and that, at the same time of the suing of said note, the appellee Ewing was within the jurisdiction of said justice; and that said note was there filed, and merged into said judgment, and cancelled; wherefore he prayed judgment for costs.

2. The appellee William H. Ewing, for a second paragraph of his separate answer, admitted his execution of the note sued on, and alleged that he was only the surety of his co-appellee, Turner, on said note; and said Ewing prayed judgment, that execution be first levied of the property of said Turner, before any levy was made on said Ewing's property.

Appellant replied to the joint and separate answers of the appellees, and said, in substance, that he admitted that the note sued on in this action was the same note set out in the justice's judgment, a transcript of which was filed with appellees' answers; and the appellant averred, that he commenced suit against both appellees, that a summons was issued for both appellees by the justice, who placed said summons in the hands of a constable of said township, who witnessed [returned?] the same endorsed, "served by reading, April 23d, 1874;" that appellant, believing that both appellees had been served, proceeded to and did take judgment by default against both appellees; that he was never informed as to the want of service in fact as to the appellee Ewing, until about sixty days had elapsed from the rendition of said judgment; that appellant admitted, that appellee Ewing was

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security, but he averred that at the time of the rendition of said judgment, and for a long time before, and ever since, the appellee Turner was and had been wholly insolvent; that, as soon as appellant was informed that said judgment had been rendered without service on the appellee Ewing, appellant abandoned said judgment, and had ever since treated the same as a nullity; that appellant had not made, nor was he then making, any effort to enforce or collect said judgment, and he offered to have the same declared null and void; that appellee Ewing was estopped from pleading the validity of said judgment, for the reason that he threatened to bring suit against appellant and the constable, in whose hands appellant had placed an execution duly issued on said judgment, and who had demanded money or property of said Ewing to satisfy said execution, if he, the constable, made any levy by virtue of said execution, alleging that said judgment had been rendered without service on him, said Ewing; and that this assertion of said Ewing to said constable was the first information or knowledge the appellant had, that the summons had not been regularly served on said appellee Ewing; wherefore the appellant said, that said judgment was null and void and of no effect.

To the appellant's reply the appellees jointly demurred, for the alleged insufficiency of the facts therein to constitute a reply to appellees' answer, which demurrer was sustained by the court below, and to this decision the appellant excepted. And, the appellant having refused to plead further, judgment was rendered upon the demurrer, in favor of the appellees and against the appellant.

The only alleged error of the court below, assigned by the appellant in this court, is, the sustaining of the appellees' demurrer to his reply to their answers.

In our opinion, this action against the appellees is a mistake on the part of the appellant. The first paragraph of the appellees' answer, or rather their only joint answer, is a complete bar to this action. For the aver-

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ments of this joint answer show clearly and conclusively, that the note sued on in this action, before the commencement of this suit, was merged in the judgment set out in said answer. It is admitted in said answer, that both the appellees were within the jurisdiction of the justice of the peace of Huntington county, in this State, who rendered said judgment. And it appears from the transcript of said judgment, which was filed with and made part of said answer, that the justice issued a summons, in the suit before him, for both the appellees, which summons was returned by the proper constable "served by reading" more than three days before the rendition of said judgment. This joint answer, therefore, set up the judgment of a justice, who had jurisdiction both of the subject-matter and of the persons of the appellees, on the note now in suit, as a former recovery thereon, in bar of the present action. This judgment was certainly a merger of the note in question. Not only so, but the judgment, while it remains in force, is valid, binding and conclusive, and may be enforced, by execution, against each and both of the appellees, and certainly it can not be impeached or attacked by either of them in any collateral proceeding. "The court of a justice of the peace is a court of record," in this State. *Hooker v. The State, ex rel., etc.*, 7 Blackf. 272. Of a judgment of a justice of the peace in this State, it has been held by this court, that "It is conclusive evidence of the facts set forth in it, and if conclusive, then no evidence can be given to contradict or impeach it. If the finding and judgment can not be contradicted in evidence, neither can it [they?] be in pleading. Whilst it remains a matter of record and conclusive evidence, facts stated in it can not be controverted." *Larr v. The State, ex rel., etc.*, 45 Ind. 364. We have said thus much on this subject, not because it was pertinent to the questions presented by the error assigned in this cause, but for the reason that it seems to us, from the entire record, that both the appellant and the appellees misapprehended the force and effect of the justice's

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judgment, set out in appellees' joint answer. Unless and until that judgment is set aside, it is valid, binding and conclusive on all the parties to this suit, and it may be enforced by final process, like any other personal judgment.

The appellee Elihu Turner separately demurred to the appellant's reply, upon the ground that it did not state facts sufficient to constitute a reply to said Turner's answer, which demurrer was also sustained, and appellant excepted.

In our opinion, the appellees' demurrers to the reply were properly sustained. The reply was evidently based upon the appellant's mistaken idea that his judgment against the appellee Ewing, before the justice, was invalid and void; whereas, as we have seen, the judgment in question was valid and binding against both the appellees. The reply was, therefore, clearly insufficient.

The separate answer of the appellee Ewing was clearly bad, as it was merely an attempt on his part to contradict the force and effect of the justice's judgment, which could not be done in this action. But the joint answer of both the appellees was a complete defence to this action.

In our opinion, no error was committed by the court below, in sustaining the appellees' demurrers to appellant's reply.

The judgment is affirmed, at appellant's costs.

THE OHIO AND MISSISSIPPI R. W. Co. v. STEEN.

SUPREME COURT.—Practice.—Evidence.—Where, on appeal to the Supreme Court, a fact essential to the validity of the finding may be fairly inferred from the evidence, the finding will not be disturbed merely because such fact was not distinctly proved.

Martin *et al.* v. Smith.

From the Knox Circuit Court.

W. H. De Wolf and *C. A. Beecher*, for appellant.

W. B. Robinson and *Denny & Burns*, for appellee.

WORDEN, J.—This was an action by the appellee, against the appellant, to recover the value of three steers, alleged to have been killed by the locomotive and cars of the defendant upon its road, where it was not fenced.

Trial by the court; finding and judgment for the plaintiff for the sum of one hundred and sixty dollars, a new trial being refused.

The only question made here is, whether the finding was sustained by the evidence.

Upon an examination of the evidence, we are of opinion that it was sufficient to sustain the finding, both as to the facts and the amount of damages assessed.

It is objected that, as to one of the steers, the evidence does not show that he was killed by the engine and cars of the company; but we are of opinion, that it might be fairly inferred from the evidence that he was thus killed.

The judgment below is affirmed, with costs.

MARTIN ET AL. v. SMITH.

SUPREME COURT.—*Brief.—Practice.*—Where, on appeal to the Supreme Court, the brief of the appellant neither states nor discusses any question arising on the record, the judgment will be affirmed.

From the Warren Circuit Court.

J. W. Sutton and *W. P. Rhodes*, for appellants.

J. McCabe and *L. T. Miller*, for appellee.

BIDDLE, J.—On the 19th day of April, 1875, two years and a half ago, the appellants placed on file in this case, what they called a brief, in which they neither state nor

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discuss a single point made in the record, since which time no brief has been filed on their behalf.

We have often decided that such points as are not presented by the briefs will not be examined by this court, but held as waived by the parties.

In accordance with this rule, the judgment is affirmed, at the costs of the appellants, with ten per cent. damages.

GALLAGHER v. HIMELBERGER ET AL.

CONTRACT.—*Landlord and Tenant.—Occupancy by Trespasser.—Ejectment.*—

During the occupancy of certain real estate by a trespasser, he was notified by the owner, that the rent therefor was a certain sum per annum, which would be demanded as a condition for its further occupancy, but the former, refusing to agree to pay such rent, as being too much, but promising to "make it right," continued his occupancy, though the owner, from month to month, made out and presented bills at a *pro rata* amount of the whole rent demanded, payment of which was refused.

Held, in an action for rent, that no express contract for the payment of such sum arose out of such notice, demand and occupancy.

Held, also, that, during the whole of such occupancy, the defendant was a mere trespasser, liable to be ejected as such at any time.

From the Cass Circuit Court.

D. P. Baldwin, for appellant.

McConnell & Nelson, for appellees.

Howk, J.—The appellant, as plaintiff, sued the appellees, as defendants, before a justice of the peace of Cass County. The cause of action was merely an open account, whereby the appellant charged that the appellees were indebted to him in the sum of two hundred dollars, for rent of eight lots in Gallagher's addition to the city of Logansport. Before the justice, on the 30th day of June, 1873, the appellees appeared in this action, and offered to confess judgment herein, and filed their consent in

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writing that judgment should be entered against them in this cause, for the sum of twenty-five dollars, and the costs of suit. This offer was not accepted, but a trial was had before the justice, which resulted in a judgment in favor of the appellant for eighteen dollars and fifty-four cents, from which judgment there was an appeal to the court below.

The cause was first tried by the court, and a finding announced for the appellant in the sum of two hundred dollars; but, on the appellees' motion, this finding was set aside and a new trial granted. Afterward, the cause was tried by a jury in the court below, and a general verdict was returned for the appellant, assessing his damages at twenty-five dollars. And, with their general verdict, the jury also, under the direction of the court, returned a special finding as to particular questions of fact, submitted to them by the parties. The appellant's interrogatories, and the special finding of the jury thereon, were as follows:

"1. Did Gallagher, in Nov. '72, notify the defendants, that his price for the lots in question, in this suit, was at the rate of five hundred dollars per year?"

Answer. "Yes."

"2. Did the defendants enter upon the lots after Gallagher had notified them, in Nov. '72, of his price?"

Answer. "Yes."

"3. When they entered, had Gallagher consented to lower or change his price?"

Answer. "No."

"4. After the defendants had entered upon the lots, did not Gallagher notify them to pay his price, to wit, at the rate of five hundred dollars per year, or quit the premises?"

Answer. "Yes."

"5. Did Gallagher, during the defendants' occupancy, render monthly bills at the rate of five hundred dollars per year?"

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Answer. "Yes."

"6. Did you find, that Gallagher ever consented that the defendants occupy his lots at a less rate of rent than five hundred dollars per year?"

Answer. "No."

"7. How long did the defendants occupy Gallagher's lots?"

Answer. "Four months and twenty-six days."

And the appellees' interrogatories, and the special finding of the jury thereon, were as follows:

"1. Did the defendants at any time lease the lands, described in the complaint, from the plaintiff?"

Answer. "No."

"5. Did the defendants ever promise to pay the plaintiff five hundred dollars per year for the use of his lands as a mill-yard?"

Answer. "No."

On written causes, the appellant moved the court below for a new trial, which motion was overruled, and to this decision the appellant excepted. And the appellant then moved the court for a judgment of two hundred dollars on the special finding of particular questions of fact, notwithstanding the general verdict of twenty-five dollars, which motion was overruled, and appellant excepted. And judgment was rendered by the court below upon the general verdict, and for costs prior to June 30th, 1873, in favor of the appellant, and for all costs accrued after June 30th, 1873, in favor of the appellees, from which judgment the appellant prosecutes this appeal.

In this court, the appellant has assigned the following alleged errors of the court below:

1st. In overruling his motion for a new trial;

2d. In overruling his motion for a judgment of two hundred dollars, on the special findings of the jury.

As preliminary to our examination and decision of the questions presented by these alleged errors, we will give

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a summary of the material facts of this case, as we gather them from the record: The appellees, in 1872 and 1873, were the owners of a steam saw-mill, in the city of Logansport, near the canal. Immediately west of their saw-mill, and adjoining it, the appellant owned a piece of ground, two hundred and eighteen and one-half feet by one hundred and seventy-six and one-half feet, which was unenclosed and unimproved. In November, 1872, the appellees, having found that logs brought to their mill were left on appellant's ground, and "not wishing to occupy it without his consent," applied to the appellant to rent his ground, and asked what the rent would be for one year. The appellant answered five hundred dollars; and the appellee Hurd, with whom the appellant was conversing, told him that was more than they could pay. The appellees continued to occupy the appellant's ground, or a part of it, with the logs brought to their mill, until May 26th, 1873. During the time, in January, 1873, the appellant again notified the appellee Hurd, that the rent was five hundred dollars; when Hurd told him, that the rent was too high, but the appellees would try to make it right with him. And again, in February, 1873, the appellee Himelberger, having received from the appellant a bill of forty-one dollars and sixty-six cents for one month's rent, saw the appellant and told him, that the appellees could not and would not pay that price; when the appellant responded, that they knew his terms, and, if it was too much, for them to move off. During the time, the appellant made out monthly bills for the rent, at the rate of five hundred dollars per year, and sent them to the appellee Himelberger; but it does not appear that the latter, or any of the appellees, paid any attention to any of these bills, except the first one, above mentioned.

It will be seen from the foregoing summary, that the appellant at all times asked and demanded rent for his ground, at the rate of five hundred dollars per year;

that the appellees at all times objected to the rent demanded by appellant, and told him that they could not, and would not, pay such rent; and that the appellees continued to occupy the appellant's ground, or a part of it, for the time before-mentioned, without any express agreement as to the rent of the ground; the appellees having full knowledge of the rate of rent demanded, and the appellant having full knowledge that the appellees could not, and would not, if they could avoid it, pay the rent demanded.

Appellant's learned counsel insists in argument, if we understand aright his argument, that this is a suit against the appellees upon their "express contract" to pay the appellant rent for his ground, at the rate of five hundred dollars per year; and the appellant announced to the court below, "that he would stand or fall by his express contract, as made by his evidence." We have been unable to find, in the record of this cause, any "express contract" by the appellees to pay the rate of rent demanded by the appellant. Can it be correctly said, that the appellees expressly contracted to do that, which they expressly said and reiterated, that they could not and would not do? We think not. The minds of the contracting parties must meet and agree, before it can be correctly said that there is an express contract between them; and certainly, where one party proposes and the other objects, and this is continued, there can be no express contract between such parties. In our view of this case, there was never any contract between the appellant and the appellees, in regard to the rent of appellant's ground. According to the evidence of the appellee Hurd, and it is uncontradicted on this point, the appellees were trespassers on appellant's ground, before he made any effort to rent the ground; and they continued to be mere trespassers thereon, during the entire time they occupied the ground, with the knowledge of the appellant. When the appellees refused to agree to pay the appellant the

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rent he demanded, he had the right to eject them from his ground, as mere trespassers; but he suffered them to remain on his ground, without any agreement on their part to pay the rent demanded, and with the knowledge on his part that they could not, and would not, pay such rent. There was no contract or agreement on the part of the appellees, but they continued, as they began, mere trespassers on the appellant's ground. This, we think, is the gist of the special finding of the jury, on the particular questions of fact, submitted to them; and, therefore, we hold that no error was committed by the court below, in overruling the appellant's motion for a judgment of two hundred dollars, on the special finding of the jury, notwithstanding their general verdict of twenty-five dollars.

The appellant has also assigned, as an alleged error of the court below, the overruling of his motion for a new trial. Many causes were assigned by the appellant for such new trial, in his motion therefor. In our opinion, it is unnecessary, and would be unprofitable, to set out these causes at length, or to comment on them in detail. It will suffice for us to say, generally, that if we could believe the appellant's theory of his case to be the true one, we would then hold, that several of the causes for a new trial were well assigned; but, believing as we do, that the appellant's view of his case was a mistaken one, and that there was no such express contract as the appellant has sued on, we are constrained to hold, as we do, that the court below did not err, in overruling appellant's motion for a new trial. From a thorough and careful examination of the record of this cause, it appears to us, "that the merits of the cause have been fairly tried and determined in the court below;" and in such a case our practice act forbids, that "any judgment be stayed or reversed, in whole or in part." 2 R. S. 1876, p. 246, sec. 580.

The judgment of the court below is affirmed, at the appellant's costs.

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DOBSON v. THE STATE.

LIQUOR LAW.—Sale.—A person, having no license, who sells intoxicating liquor in quantities of a quart or more at a time, separating that sold from the bulk out of which it is drawn, is not liable to a prosecution therefor, though the same be not then paid for by the purchaser, but charged as a sale on account, and though the purchaser take away less than a quart, leaving the remainder, so separated, subject to his order.

SAME.—Motive.—Evasion of Law.—The vendor, in such case, is not punishable, whatever may have been his motive or purpose in making the sale.

From the Madison Circuit Court.

C. D. Thompson, for appellant.

C. A. Buskirk, Attorney General, for the State.

WORDEN, J.—The appellant was indicted for selling, to one William A. Runyon, whiskey by a less quantity than a quart at a time, to wit, one pint, at and for the sum of twenty-five cents, without a license.

Trial by a jury; conviction and judgment. New trial refused.

It appeared by the evidence, that Dobson was a clerk in the drug-store of Vinson & Hughes, and, as such clerk, sold to Runyon at several times whiskey, but never less than a quart at a time. Runyon testified that he never bought less than a quart at a time, but that sometimes he did not take it all away at once; that he sometimes took a part of it away at the time of purchase, and afterward took away the residue.

Dobson also testified that he never sold whiskey to Runyon by a less quantity than a quart at a time; that when Runyon wanted a quart of whiskey, but did not wish to take it all away at once, he would draw him a quart, in a bottle, give him as much as he wanted to take away at the time, and set the residue away for him, in the bottle, subject to his order. Runyon never paid Dobson for any whiskey, but when the latter sold any to the former, it was charged to him on the books of the firm, and settled for with other accounts. The quart was

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charged to Runyon, whether it was all taken away at the time or not.

The court charged the jury, amongst other things, as follows: "The evidence in this cause shows that the sale, as by the terms of the contract, was for a quart at a time; but frequently the party purchasing would take a half pint at a time, leaving the residue of the amount purchased to be delivered when he might come again. If, from the evidence, you are satisfied that it was an effort to evade the law, it was no defence," etc.

Besides the impropriety of the court charging the jury as to what was shown by the evidence, the charge, as we think, contains an erroneous statement of the law. We understand the charge to mean, that, though a quart was sold at a time, yet if only a part of it was delivered at the time of sale, and the residue afterward, and if this was an effort to evade the law, the defendant would still be amenable to the law, and liable as for selling by a less quantity than a quart at a time.

If, when Runyon bought his whiskey, it was drawn from the cask into a bottle, and thus separated from the bulk, and set away for him, and charged to him on the books of the company, the title to the whole quart passed to him, though he may have taken away only a part of it at the time of sale. There was nothing further for the vendor to do to identify precisely the thing sold. *Murphy v. The State*, 1 Ind. 366. The residue of the quart not taken away by Runyon was, doubtless, at his risk, and the vendor with whom it was left could only be responsible for it as a bailee. The vendor could recover for the whole quart, whether Runyon ever came after the residue or not. Actual delivery of the thing sold is not necessary to the passing of the title to the purchaser. *Sutton v. Sears*, 10 Ind. 223; *Sherry v. Picken*, 10 Ind. 375; *Cloud v. Moorman*, 18 Ind. 40.

If the appellant sold a quart at a time, and no less, so as to pass the title to the purchaser, although it may

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not have been all delivered at the time, he can not, in our opinion, be guilty of selling by a less quantity than a quart at a time, whatever may have been his motive or purpose in making the sale.

The judgment below is reversed, and the cause remanded for a new trial.

WILSON v. THE STATE.

CONTEMPT.—*Witness.*—*Refusal to Obey Process.*—An attachment for contempt of court may be issued against a witness, based solely upon the sheriff's return on a subpoena for such witness, showing the latter to have wilfully refused to permit such subpoena to be served upon him, and his refusal, with knowledge of its nature, to obey the same.

SAME.—*Practice.*—*Answer.*—*Evidence.*—Where, in such case, a witness so attached for contempt of court answers by his affidavit, denying the truth of the matter alleged against him, and setting up a state of facts consistent with his innocence, and that he intended no contempt or interference with the process of the court, he should be discharged; and it is error in the court to proceed to hear evidence as to the truth of the charge and the falsity of the answer.

From the Hancock Circuit Court.

C. G. Offutt, and *W. H. Martin*, for appellant.

C. A. Buskirk, Attorney General, for the State.

NIBLACK, J.—On the 29th day of March, 1877, which was during a regular term of the court below, a summons was issued for the appellant, requiring him to appear, and testify as a witness, before the grand jury of Hancock County, which was then in session, and was delivered to an acting deputy-sheriff of said county, who, in the name of the proper sheriff, returned the summons endorsed, "Served by telling defendant that I had a subpoena for him for to-day, and defendant run, and kept out of my reach, so that I could not read to him."

57	71
131	314
57	71
140	15
141	303
57	71
1187	178

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Upon the return of the summons, an attachment was issued against the appellant for an alleged contempt of court, in disobeying its process, and he was arrested and brought into court on the attachment.

When the attachment was returned, the appellant moved the court to quash the writ, and to discharge him from custody, because no affidavit had been filed against him, alleging any contempt of court on which to base an attachment.

That motion was overruled, to which the appellant excepted. The appellant then, for the purpose of purging himself of the contempt with which he was charged, filed a statement in writing, under oath, giving a different version of what occurred when the officer attempted to serve the summons on him, and, in substance and in legal effect, denying the charge against him, contained in the sheriff's return to the summons, and particularly any intention of disobeying the process of the court.

After the appellant had thus answered in writing, the court, over his objection, compelled him to answer orally numerous questions propounded by the court, concerning such alleged contempt, to which the appellant also excepted, and, after so examining him orally, the court adjudged him guilty of the contempt charged against him, and assessed a fine against him of twenty dollars, for which a judgment was rendered, with costs of suit.

The action of the court below, in overruling the motion to quash the attachment and to discharge the appellant, is assigned for error here.

This being a proceeding to punish the appellant for a constructive contempt, and being in the nature of a criminal proceeding, the case of *Whitem v. The State*, 36 Ind. 196, is relied on as authority that an affidavit ought to have been filed against the appellant before the attachment was issued.

It was said in that case, that "The proceeding against a party for a constructive contempt must be commenced by

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either a rule to show cause, or by an attachment, and such rule should not be made or attachment issued, unless upon affidavit specifically making the charge."

We think the rule thus laid down is the correct one, as applied to the class of constructive contempts to which that case belonged; but this court, in commenting on that case, in a subsequent opinion, said, that the "ruling in that case in no manner changes the rules of law and practice as to attaching witnesses for a failure to obey the process of the court." *Cutler v. The State*, 42 Ind. 246.

The return of the sheriff in this case supplied the place of an affidavit, and, we think, laid a sufficient foundation for either a rule or an attachment.

The action of the court in requiring the appellant to answer questions orally, after he had answered in writing, under oath, is also assigned for error in this court.

The practice in this State has not been strictly uniform in the method of proceeding against the party charged upon the return of an attachment, for a contempt of court.

Our courts, in some instances, have followed the old chancery practice, by hearing evidence in support, as well as in denial, of the defendant's answer, and then deciding the case on the defendant's answer, in connection with such other evidence. In other cases, it has been held, that the court must decide the case on the defendant's answer to the attachment, when he has fully answered all the charges against him. *The State v. Earl*, 41 Ind. 464.

In the case of *Burke v. The State*, 47 Ind. 528, the rule governing proceedings in such cases was fully considered. It was, in substance, decided in that case, that where a person charged with a constructive contempt, in procuring a witness to absent himself, appears, and, in answer to a rule, makes a statement under oath, that the matters in the affidavit against him are not true, and sets up a state of facts consistent with his innocence, and that there was no intention on his part to interfere with the process of

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the court, he should be discharged; and it is error for the court to proceed to hear evidence of the truth of the original affidavit and the falsity of the answer.

The rule thus laid down is well sustained by authority, and is, in our opinion, applicable to the case at bar.

Upon the authority of that case, the judgment below will have to be reversed.

The judgment is reversed, and the cause remanded, for further proceedings, in accordance with this opinion.

THE CITY OF HUNTINGTON v. CHEESBRO.

57	74
180	113
57	74
142	36

CITIES AND TOWNS.—Ordinance.—Pedler.—Under the provisions of specification 23 of section 53 of the act of March 14th, 1867, (1 R. S. 1876, p. 267,) for the incorporation of cities, a city of this State, organized under such act, has the power to adopt an ordinance restraining any person from peddling within her limits without having a license so to do, and prescribing a punishment for its violation.

SAME.—Constitutional Law.—Such ordinance violates no provision of either the state or federal Constitution.

SAME.—Action for Violating.—Pleading.—A complaint for a violation of a city ordinance need not set out a copy thereof, it being sufficient to refer therein to the number of the section of the ordinance alleged to have been violated.

From the Huntington Circuit Court.

B. F. Ibach, for appellant.

WORDEN, J.—This was an action by the City of Huntington, against the appellee, brought before the mayor of Huntington, and appealed to the circuit court. In the latter court, the defendant moved to dismiss the cause on the ground, that the affidavit or complaint did not state facts sufficient, and that the ordinance on which it was founded was unconstitutional and void. This motion was

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sustained, and the action dismissed, and the appellant excepted.

The complaint was as follows, after entitling the cause: "The City of Huntington complains of the said defendant Wilson Cheesbro, late of said city, and says, that the said defendant, on the 9th day of October, 1875, at the city and county aforesaid, did then and there violate section 4 of chapter 6 of an ordinance of said city, passed by the common council thereof on the 17th day of December, 1873, by unlawfully following the occupation of a pedler, with a wagon, in the city limits, without a license so to do, as provided in section 2 of said chapter 6; wherefore the plaintiff demands judgment [for] one hundred dollars as provided in section 4 of said chapter.

This complaint was duly signed by the city attorney, and properly verified.

We are unable to see any objection to the complaint. We may observe that we have no brief for the appellee, the counsel appearing for him on the submission of the cause having withdrawn their appearance.

We may consider the grounds stated in the motion to dismiss, which were, as we have seen, that the complaint did not state facts sufficient to constitute a cause of action, and that the ordinance on which it was founded was unconstitutional.

The latter ground is probably embraced in the former; for, if the ordinance is unconstitutional, a complaint for its violation could hardly state facts sufficient to constitute a cause of action. The complaint was not defective, because a copy of the ordinance charged to have been violated was not set out. The statute provides, that "it shall not be necessary to file with the affidavit or complaint, a copy of the ordinance, or section thereof, charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been violated, with the date of its adoption." 1 R. S. 1876, p. 273, sec. 19.

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The complaint alleges the manner in which the ordinance was violated, viz.: "by unlawfully following the occupation of a pedler, with a wagon, in the city limits, without a license so to do, as provided in section 2," etc. In this the complaint differs from that in the case of *The City of Huntington v. Pease*, 56 Ind. 305.

The city had power to pass an ordinance requiring a license for peddling in the city. The common council had power "to restrain hawking and peddling." Specification 23, sec. 53, of the act for the incorporation of cities, 1 R. S. 1876, p. 267. The power to restrain carries with it the power to license. *Smith v. The City of Madison*, 7 Ind. 86.

We are not aware that such an ordinance violates any provision of the state or federal constitution.

We are of opinion that the complaint was good, and that the court erred in dismissing the action.

The judgment is reversed, with costs, and the cause remanded, for further proceedings.

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LIQUOR LAW.—Sale to Minor.—Indictment.—An indictment for selling intoxicating liquor to a minor, alleging him to have been, at the time and place of such sale, "then and there a person under the age of twenty-one years," is sufficient.

SAME.—Evidence.—Former Conviction.—Evidence of a former conviction is admissible under the general issue.

SAME.—Once in Jeopardy.—Same Evidence in Two Prosecutions.—Two indictments having been returned against a defendant, each charging an unlawful sale of intoxicating liquor, on the same day, to the same person, the State, on the trial of the first, on which the defendant was convicted, introduced evidence of two unlawful sales to such person, made by the defendant on the same day, without any election having been made by the prosecuting attorney as to which of such sales he would insist upon for a conviction. On the trial of the second indictment, evidence was intro-

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duced by the defendant of such former conviction, and that the evidence in each prosecution related to the same sales.

Held, that the defendant had once been put in jeopardy, and that a conviction on the second indictment, on the same evidence, was erroneous.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

C. A. Buskirk, Attorney General, for the State.

PERKINS, C. J.—Indictment for selling intoxicating liquor in a less quantity than a quart, etc., by Barney Brinkman, to one, James DeArmond, “he, the said James DeArmond, being then and there a person under the age of twenty-one years.”

A motion to quash, on the ground that the minority of DeArmond was not alleged with sufficient particularity, was overruled. It is claimed that his age should have been stated.

We think the indictment unobjectionable. The defendant was tried by the court and convicted. On the trial, the defendant proved, that, on the day previous to that of the present trial, he had been convicted, on a similar indictment, charging a selling, in a less quantity than a quart, to the same person, etc., on the same day named in the indictment in the present case. He introduced on the trial a record of that conviction, and also the evidence on which it was based. Former conviction or acquittal was admissible under the general issue.

The testimony touching the sales of liquor, given on the former trial, was as follows:

James DeArmond testified: I was in the defendant’s saloon on the 23d day of June last; (the day the selling was charged to have taken place in both indictments.) I bought of the defendant on that day, at his saloon, a drink, of what is called “kimmel.” I bought three glasses. Isaac Lewis and James Burke were with me. About two hours after this drink, I drank again of the same “kimmel.” I took the second drink a few minutes after dinner.

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Isaac Lewis testified: I was in the saloon with DeArmond, on the 23d of June, the day named in the indictment, and drank with him. It was in the afternoon.

There was testimony also, on the trial upon the first indictment, tending to show that DeArmond was a minor, that "kimmel" is an intoxicating liquor, and that the saloon of defendant was in Decatur county. There was a verdict of guilty on the trial upon the first indictment, a fine assessed, and final judgment rendered against the defendant.

There is nothing in the record enabling any one to determine, whether the conviction was for the liquor furnished in the forenoon or afternoon.

On the trial upon the second indictment, evidence was given of the procuring from the defendant, and of the drinking, of the same kind of liquor, by the said DeArmond, in the forenoon and in the afternoon of said 23d day of June, and there was a general finding of guilty, and a fine imposed, the record containing nothing by which it can be determined by any one, whether the second fine was for the liquor furnished and drank in the forenoon or in the afternoon. The first trial was by a jury, the second by the court.

On the trial upon the second indictment, the defendant, as we have said, gave in evidence the record of the first trial, and the evidence given upon it, as establishing a former conviction, but the court, nevertheless, found the defendant guilty. A motion for a new trial was made and denied, and exception taken.

As neither indictment designated the part of the day—the 23d of June—in which the sale charged in it took place, and as two were charged to have taken place on that day, one in each indictment, the prosecutor should have stated as to which sale he would direct the evidence on each of the several trials, so that the records severally might show an acquittal or conviction on each alleged sale. By that course, the defendant would have been

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protected from conviction twice for the same selling. But by the mode, adopted by the prosecution, of giving evidence as to both sales on each indictment, both convictions may have been secured for the same selling. Suppose, for example, the jury, on the trial upon the first indictment, having the evidence as to both alleged sales before them, found that one of said alleged sales was not satisfactorily established, but that the other was; they would have been justified in returning a verdict of guilty. Suppose, on the trial by the court upon the second indictment, as was the case here, the evidence as to both alleged sales was given, and the court was satisfied that the same alleged sale, regarded as not proved by the jury, was not proved before it, but that the other was, and convicted the defendant; the conviction would be justified by the evidence for the State, and the defendant be twice convicted for the same offence; and this result would be brought about by the action of the State.

Under the state of facts presented, which may have occurred in this case, it would be impossible for a defendant to prove an actual former acquittal or conviction; but he could show that he might have been acquitted or convicted on the former trial, that evidence touching his case had been given on a former trial, and that it had been submitted to a court or jury, which had passed upon it.

In such case, we think the party is entitled to an acquittal, on the ground of former conviction or acquittal, where he shows that his case has been previously submitted to a court or jury that might have convicted or acquitted him. He shows in such case a previous jeopardy.

The judgment below is reversed, and the cause remanded for a new trial.

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87	80
134	85
135	238
57	80
140	363
141	25
141	238

CRIMINAL LAW.—*Murder.—Self-Defence.—Retreat when Assailed.—Use of Deadly Weapon.—Instruction to Jury.*—On the trial of a defendant indicted for murder, where the evidence showed, that he, being disabled in one arm, had procured a pistol to defend himself against a threatened assault by an able-bodied man, and that, while standing on a public street, leaning against a building, surrounded by an excited crowd, he had been threatened by another person, and then struck by a third, the deceased, whom he at once had shot and killed, the court instructed the jury, that, "before a man can take life in self-defence, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault."

Held, that such instruction is erroneous.

Held, also, that, where a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, he kills his assailant, he is justifiable.

Held, also, in such case, that, from the evidence, the real question presented for the determination of the jury was, did the defendant, when assaulted, believe, and have reason to believe, that the use of a deadly weapon was necessary to his own safety?

Held, also, that no question as to the duty of the defendant to retreat was presented to the jury by the evidence.

From the Henry Circuit Court.

J. T. Mellette, M. L. Bundy and Brown & Brown, for appellant.

C. A. Buskirk, Attorney General, and *W. F. Walker*, Prosecuting Attorney, for the State.

NIBLACK, J.—At the February term, A. D. 1877, of the Henry Circuit Court, the appellant, John Runyan, was indicted and tried for the murder of one Charles Pressnal. He was convicted of manslaughter, and sentenced to the state-prison for the term of eight years.

From the evidence, as it comes to us in the record, it appears that the appellant, who resided two or three miles from that place, went to Newcastle, in the county of Henry, in company with some other persons, on the

7th day of November, 1876, being the day of the last presidential election, for the purpose of casting his vote. During the day, one John Spell, a large and vigorous man, had an altercation with the appellant, during which the said Spell used harsh, opprobrious and threatening language. Afterward, during the afternoon, the said Spell, on one or two other occasions, used other angry and threatening language to the appellant. Sometime in the afternoon, the appellant, whose right arm was so crippled that he had not full and free use of it, went to an acquaintance of his, who lived near by, and borrowed a pistol, saying that Spell was threatening him and following him up, and that he wanted to be able to defend himself in case he was attacked.

After dark that evening, the appellant, with some of his friends, went across to the place of voting to get some election news, if they could, before leaving for home. The appellant stopped on the sidewalk, near the voting place, and leaned himself against the wall of an adjacent building. While standing in that position, he was approached by one Benjamin F. Moore, a constable of the township and an assistant marshal of the town, who commenced a quarrel with him, using angry, threatening and disparaging language toward him. While thus engaged with the appellant, Moore discovered one Henry Ray, a brother-in-law of the appellant, standing near by, a crowd having gathered around in the meantime, and turned on said Ray to push him away, and out of the crowd. After Moore thus turned away, the deceased rushed upon the appellant and hit him two or three blows; the appellant thereupon drew a pistol from his coat pocket and shot the deceased, inflicting upon him a mortal wound, of which he soon afterward and on the same evening died.

This is a brief outline of the circumstances connected with the killing of the deceased, as we have tried carefully to make it from a voluminous mass of testimony.

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A motion for a new trial was entered at the proper time and overruled.

On the trial, the court, of its own motion, gave to the jury a series of elaborate and carefully prepared instructions in writing, consisting of eighteen in number, to the giving of each of which the defendant reserved an exception. The action of the court in giving these instructions was assigned as one of the causes for a new trial.

The defendant in his brief urges objections to two only of these instructions, known as numbers seven and eight of the series, and only to so much of them as relates to the supposed duty of a person to retreat when assailed, before taking the life of his assailant.

In instruction number seven, the court commences by saying:

"The law gives to every man the right of self-defence. This means that a man may defend his life, and may defend his person from great bodily harm. He may repel force by force, and he may resort to such force as, under the circumstances surrounding him, may reasonably seem necessary to repel the attack upon him, and, in his defence, he may even go to the extent of taking the life of his assailant. The law, however, is tender of human life, and will not suffer the life even of an assailant and wrong-doer to be taken, unless the assault is of such a character as to make it appear reasonably necessary to the assailed to take life in defence of his own life, or to protect his person from great bodily harm. And if the person assailed can protect his life and his person by retreating, it is his duty to retreat, and thus avoid the necessity of taking human life. Do not understand me, gentlemen, to say, that retreat is always necessary, before the party assailed may take life in his defence. Retreat might be perilous or impossible, and might tend only to increase the danger.

"If the assault is of such a character that it reasonably appears to the party assaulted that retreat can not be

made so as to protect his life, or his person from great bodily harm, then retreat is not required."

The court, further on in the same instruction, after discussing the right of a person to defend himself in the use and enjoyment of the public highways, including the streets of towns and cities, and other contingencies in which the law permits human life to be taken in self-defence, adds: "And before a man can take life in self-defence, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault."

We do not copy the instruction entire, as it is of great length, and includes other legal propositions, to which the defendant makes no objection.

That portion of the instruction last above quoted clearly does not state the law of self-defence correctly, as it is now recognized by the general drift of the American authorities.

1 Bishop on Criminal Law, 5th ed., sec. 865, says: "This right of self-defence is commonly stated in the American cases thus: If the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable." Numerous cases are cited by him in support of that position. See, also, *Creek v. The State*, 24 Ind. 161; *Hicks v. The State*, 51 Ind. 407; *Wall v. The State*, 51 Ind. 453.

In the case of *Creek v. The State*, above cited, it was held, that retreat is not always a condition which must precede the right of self-defence.

Wharton on Criminal Law, vol. 2, sec. 1019, says: "A man may repel force by force in the defence of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he

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find himself out of danger; and if, in a conflict between them, he happen to kill, such killing is justifiable. The right of self-defence in cases of this kind is founded on the law of nature; and is not, nor can be, superseded by any law of society. * * * The right extends to the protection of the person from great bodily harm."

A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence.

The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable. Whatever may have been, or now is, the true rule in such a case, we think the instruction from which we have quoted, whether considered in its separate parts, or taken altogether, laid too much stress on the duty of a party when assailed to retreat, before attempting to repel force by force, and thus prescribed too rigid a rule as applicable to the case at bar.

As we construe the evidence before us, we are inclined to the opinion, that the question of the defendant's duty to retreat when he was assailed was not fairly involved in this case, when it went to the jury. The defendant was already standing practically against a wall, and surrounded by a crowd of persons, some of whom, at least,

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were unfriendly to him. While standing in that position, he was first approached by one person in an angry and threatening manner, and, when that person's back was turned, he was assaulted by another. It seems to us, that the real question in the case, when it was given to the jury, was, was the defendant, under all the circumstances, justified in the use of a deadly weapon, in repelling the assault of the deceased? We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm? On that question, the law is simple and easy of solution, as has been already seen from the authorities cited above.

In our opinion, the court erred in giving the instruction numbered seven to the jury, and that, for that reason, the judgment will have to be reversed.

We regard instruction number eight as obnoxious, to some extent, to the same objection urged against number seven, but we do not think it necessary to set it out, or further notice it here, in addition to what has already been decided.

Other questions were reserved on the trial, and are presented to us by the record, but as they may not again arise in the cause, we deem it unnecessary to pass upon them now.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will issue the necessary notice for the return of the defendant.

Petition for a rehearing overruled.

 Jonesboro and Fairmount Turnpike Co. v. Baldwin.

57	86
130	617
57	86
143	428
57	86
147	331

JONESBORO AND FAIRMOUNT TURNPIKE CO. v. BALDWIN.

PLEADING.—Turnpike.—Action for Damages.—Notice.—Negligence.—Contributory Negligence.—In an action against a turnpike company, to recover damages for an injury received by the plaintiff while travelling on the road of the defendant, alleged to have been caused by a defect in such road, which, as alleged, the defendant had negligently suffered and permitted to become and remain out of repair, the facts alleged in the complaint showed, that, prior to travelling over such road and receiving such injury, the plaintiff had notice of such defect.

Held, on demurrer, that the complaint is insufficient, the allegations thereof showing the plaintiff to have been guilty of contributory negligence.

SAME.—Evidence.—On the trial of such action, the evidence showed, that the plaintiff, with notice of such defect, and with an opportunity to have avoided injury by travelling upon another and equally convenient road, had passed over the road of the defendant, merely because he preferred so to do, and had been injured in so doing, by reason of such defect.

Held, that he was guilty of contributory negligence, and can not recover.

SAME.—Practice.—Pleading.—In such an action, facts tending to establish contributory negligence on the part of the defendant are admissible in evidence under the general denial, without being specially pleaded.

From the Grant Circuit Court.

I. Van Devanter, J. F. McDowell and D. V. Burns, for appellant.

A. Steele and R. T. St. John, for appellee.

PERKINS, C. J.—Suit by the appellee, against the appellant, to recover damages for injuries occasioned by a defect in appellant's highway.

A demurrer to the complaint, because it did not show a cause of action, was overruled, and exception taken.

Answer in two paragraphs:

1. General denial; and,
2. That the plaintiff was guilty of contributory negligence.

This second paragraph, we may observe, was included in the first.

The issue was tried by a jury, and a verdict of five hundred and thirty-two dollars and fifty cents rendered.

A motion for a new trial was denied, and judgment rendered on the verdict. The evidence is in the record.

Two alleged errors are assigned:

- 1st. Overruling the demurrer to the complaint; and,
- 2d. Overruling the motion for a new trial.

The causes assigned for a new trial were:

1. Verdict contrary to evidence and law; and,
2. Error in giving and refusing instructions, specifying them.

The complaint contained, among others, these allegations:

"The defendant carelessly and negligently suffered and permitted the gravel on said road to become worn, so that a deep hole was made in one side of the track of said road, which plaintiff, with reasonable care and prudence, could not avoid, notwithstanding plaintiff had notified defendant of the fact that the same was so out of repair at said last named place."

Upon the authority of the case of *The President, etc., of Mount Vernon v. Dusouchett*, 2 Ind. 586, we hold the complaint in the case under consideration bad. The case cited is directly in point. It has been repeatedly followed. *Riest v. The City of Goshen*, 42 Ind. 339, and cases cited.

Taking the allegations in the complaint altogether, they show that the plaintiff knew of the hole in the road, before he ran into it.

On the trial, the plaintiff testified thus:

"In July, 1872, I was teaming from Jonesboro to Fairmount. There was a place, near a bridge, worn off into quite a sink, about eight or more inches deep. I filled it up a time or two with chunks. There was no chance to get round it. The wheel would go down quick, eight or ten inches. I told Samuel Eastus, the toll-gate keeper, a half a dozen times, to fix it, a month or so before the accident. I told him I would quit paying toll, if they did not fix it. * * * I was very careful that morning. * * * I tried to keep out of the wagon track. I went nearly

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two feet to the left, and think by so doing I avoided the worst of it. * * * I knew it was a bad place. I might have gone another road, but I wanted to go on the pike. There was another road; sometimes I went it. The other road was tolerably good at that time, but I preferred going on the pike."

If there is any legal proposition thoroughly established as a general rule it is this, that a party can not recover compensation for an injury, which, by the exercise of reasonable care, he could have avoided. Controversy is at an end upon this proposition. *Louisville, etc., Railway Co. v. Boland*, 53 Ind. 398.

That the injury complained of in this case could have been avoided by the use of such care, appears plain, upon a bare reading of the plaintiff's testimony. It falls within no exception to the general rule.

The judgment is reversed, with costs, and the cause remanded, etc.

ECKLEMAN v. MILLER, ADM'R.

INSTRUCTION TO JURY.—*New Trial.—Practice.—Assignment of Error.—Supreme Court.*—Error in giving or refusing instructions to the jury is ground for a new trial, but can not be independently assigned, as such, on appeal to the Supreme Court.

CONTRACT.—*Party-Wall.—Verdict.—Special Finding.—Interrogatory to Jury.*—

On the trial of an action by A., against B., owners of adjoining lands, to recover one-half of the value of a party-wall erected by the former, on an alleged promise by the latter to pay for the same as soon as his half should be used in erecting a building, the jury found, generally, for the plaintiff, and, specially, that the defendant had consented to allow the plaintiff to erect such wall, on condition that the half erected on the defendant's premises should be paid for by the person who should thereafter use such wall, and that such use had been made by a person to whom such premises had been conveyed by the defendant.

Held, that, on the special finding of the jury, the defendant is entitled to judgment notwithstanding the general verdict.

Eckleman v. Miller, Adm'r.

From the Elkhart Circuit Court.

R. M. Johnson and *J. D. Osborn*, for appellant.

H. D. Wilson, *O. T. Chamberlain*, *J. H. Baker* and *J. A. S. Mitchell*, for appellee.

Howk, J.—In this action, the appellant was the plaintiff, and the appellee was the defendant, in the court below. Appellant's complaint was in two paragraphs:

In the first paragraph, the appellant alleged, in substance, that on the 11th day of October, 1874, said Cynthia M. Davis died testate, and, in November following, the appellee was appointed executor of said decedent's estate; that on the 1st day of April, 1868, the appellant was, and still was, the owner in fee-simple, and in the possession, of the north twenty feet of lot number fifty-eight, in the town of Elkhart, in Elkhart county, Indiana; that on said 1st day of April, 1874, said Cynthia M. Davis was seized in fee-simple, and in the possession, of the south twenty feet of lot number fifty-nine, in said town of Elkhart; that on the — day of May, 1871, the appellant, being about to erect on his said lot a large three-story brick store-room, twenty feet in width and eighty feet in depth, fronting on the east line of his said lot, and being about to place the north wall of said building all on his own land, the said Cynthia M. Davis requested the appellant to place the one-half of the said north wall of said building on her said lot, so that the said wall, when erected, would be a division and party-wall between the said lots, so owned by the appellant and said Cynthia M. Davis, and then and there agreed to and with the appellant, that, if the appellant would so place the north wall of his said building upon said two lots, as that one-half of said wall, in thickness and height, would be on appellant's lot, and the other half thereof on her lot, she, Cynthia M. Davis, would pay the appellant the one-half of the value of said north wall of said building, whenever the same was used in the erection of a building on her

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said lot; that, in good faith, relying upon the said promise and agreement of said Cynthia M. Davis, the appellant, during the summer of 1871, erected said brick building on his said lot, and so placed the north wall thereof that the one-half of said wall rested on appellant's lot, and the other half thereof on the lot of said Cynthia M. Davis, as requested by her; that on the 25th day of September, 1872, said Cynthia M. Davis sold and conveyed her said lot, together with the one-half of said party-wall, to one Louisa J. Chapman, who erected thereon, in the summer of 1872, a three-story brick building, using as the south wall thereof and as a support to and for, and a part of, her said building, the said wall so erected by the appellant; that the value of the one-half of said wall, so used by said Louisa J. Chapman as the grantee of said Cynthia M. Davis, is one thousand dollars; that said Louisa J. Chapman used said wall, and took possession of one-half of the same, under and by virtue of the said conveyance to her of said premises by said Cynthia M. Davis, and without paying appellant therefor, though demanded, and had ever since used said wall for the support of her said building; that no part of the cost or value of said wall had been paid to appellant by any one; and that the same was due and owing from the estate of said Cynthia M. Davis, deceased. Wherefore, etc.

In the second paragraph of his complaint, the appellant alleged substantially the same facts as in the first paragraph, except that he alleged in the second paragraph, that said Cynthia M. Davis agreed, that whenever said party-wall was used on her lot, "whoever used the said wall should pay for it."

Appellee answered the appellant's complaint in two paragraphs, as follows:

1. A general denial;
2. In the second paragraph of his answer, the appellee alleged, in substance, that he admitted the appellant's ownership of the real estate claimed by him in his com-

plaint, and that appellant, at the date mentioned by him, erected a brick building on his said lot, and that, by and with the consent of appellee's decedent, the appellant erected his north wall about six inches over on the lot then owned by said decedent; but the appellee said, that, notwithstanding the premises, the appellant ought not to maintain his action against the estate of said decedent, for that the said wall was erected under the following circumstances, to wit: That the appellant, being about to erect his said building, requested permission from said decedent, then the owner of the lot north of appellant's lot, to rest the north half of his wall on said decedent's ground for support, and to get the benefit of six inches' additional width to his building; that said decedent, being so requested, gave the appellant license so to support the north half of his north wall on her ground, but the appellee said that said license was given upon the express condition, that said decedent was not to own any part of said wall, nor was the same to become appurtenant or attached to her lot, until the same should be used and paid for by whomsoever should appropriate and use the same, but was to remain the appellant's property; that said decedent then informed the appellant that she never intended to build on her lot, and that if she would in any manner become liable to pay for any part of said wall, she would refuse her assent to appellant to build thereon; that said decedent never in any manner claimed or owned any interest in said wall, and when she sold her lot to said Louisa J. Chapman, she informed said Louisa's agent that she had no right nor interest in said wall, and that she received no consideration whatever for said wall, when she sold her lot; and that the said Louisa had used and appropriated the said wall to her own use, if at all, without the advice, consent or procurement of said decedent. Wherefore, etc.

Appellant demurred to the second paragraph of the answer, for the alleged insufficiency of the facts therein

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to constitute a defence to his action, which demurrer was overruled by the court below, and to this decision the appellant excepted. And the appellant then replied by a general denial.

The action, being at issue, was tried by a jury, in the court below, and a general verdict was returned for the appellant, assessing his damages at five hundred and sixty dollars. And the jury also returned, with their general verdict, a special finding as to particular questions of fact, submitted to them by the parties under the direction of the court below. We need not notice the answers of the jury to the appellant's interrogatories, as these interrogatories, and the answers thereto, relate to matters virtually admitted in the second paragraph of appellee's answer, and have no connection whatever with the alleged agreement of said Cynthia M. Davis, deceased, as the same is stated in either paragraph of the appellant's complaint. We set out, however, the interrogatories propounded to the jury by the appellee, and the answers of the jury thereto, under the direction of the court, for the reason that upon the special finding of facts, as contained in these interrogatories and answers, the court below rendered judgment for the appellee, notwithstanding the general verdict of the jury for the appellant. These interrogatories and answers were as follows:

"1st. Did Mrs. Davis agree unconditionally, that she would pay for any part of the wall in controversy?

"Answer. No.

"2d. With, or through whom, was the agreement concerning said wall made?

"Answer. Dean Swift.

"3d. Was there any other agreement between said Eckleman and Mrs. Davis, except such as was made through Mr. Swift?

"Answer. No.

"4th. If there was any other agreement than that

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recited by Mrs. Swift, when, where, and with whom was it made?

"Answer. ———.

"5th. Was not Mrs. Davis' consent, to allow said wall to be built on her premises, procured, on the condition that the person who should thereafter use said lot should be liable to pay for it?

"Answer. Yes.

"6th. Was not her consent procured by Mr. Swift, on condition that the person who should join on and use said wall should be chargeable for the same?

"Answer. Yes.

"7th. Was said wall ever used by Mrs. Davis?

"Answer. By her assignees.

"8th. Was there ever any notice given to Mrs. Davis, that said wall had been used, and was there ever any demand made for the payment of the same?

"Answer. None in testimony."

On written causes filed, the appellee moved the court below for a new trial, which motion was overruled, and appellee excepted. And appellee then moved the court for judgment in his favor upon the special finding of the jury of particular facts, notwithstanding the general verdict, which motion was sustained, and to this decision the appellant excepted. And judgment was accordingly rendered by the court below, in favor of the appellee and against the appellant.

In this court, the appellant has assigned the following alleged errors of the court below:

1st. In overruling appellant's demurrer to the second paragraph of appellee's answer;

2d. In giving to the jury instructions numbered one, two, three, five, six and nine, of the court's own motion;

3d. In giving to the jury instructions numbered one, two and three, at the appellee's request; and,

4th. In sustaining the appellee's motion for judgment

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on the special finding of the jury, notwithstanding their general verdict.

Appellant's counsel have not, in their argument of this cause in this court, discussed the insufficiency of the facts stated in the second paragraph of appellee's answer to constitute a defence to this action. We therefore regard the first alleged error as waived by the appellant. The giving, or refusing, of instructions to the jury is matter occurring at the trial. If the instructions of the court to the jury are claimed to have been erroneous, and were excepted to at the time by the party complaining of them, the giving of such instructions may be assigned as a cause for a new trial, in a motion therefor addressed to the court below, as error of law occurring at the trial, and excepted to at the time. But the giving of such instructions is not properly assignable, and can not be assigned, as error, in this court, when the party complaining of such instructions has made no motion for a new trial, in the court below. In this case, the appellant made no motion for a new trial of this cause, in the court below. And, therefore, the second and third alleged errors are not properly assigned as errors, in this court, and they present no questions for our consideration.

The fourth alleged error, assigned by the appellant, is, that the court below erred, in sustaining the appellee's motion for judgment on the special finding, notwithstanding the general verdict. The question presented for our consideration by this alleged error is this: Were the particular questions of fact, or any of them, specially found by the jury, inconsistent with their general verdict? If they were, then, under the express provision of the 337th section of the practice act, the special finding of the facts "shall control" the general verdict, "and the court shall give judgment accordingly." 2 R. S. 1876, p. 172. *Thompson v. The Cincinnati, etc., Railroad Co.*, 54 Ind. 197.

Appellant's cause of action against the estate of appel-

lee's decedent was founded upon the agreement of said decedent, made in her lifetime. As stated in the first paragraph of appellant's complaint, the decedent's agreement was an unconditional promise that she would pay the appellant the one-half of the value of the party-wall, whenever the same was used in the erection of a building on her lot. And, as stated in the second paragraph of the complaint, the decedent's promise was, that "whoever used the said wall should pay for it." Now, to justify the jury in their general verdict against the estate of appellee's decedent, it was necessary that they should find that the decedent made such an agreement, or promise, as was stated in the one or the other of the paragraphs of the appellant's complaint. But the jury found specially the following fact: "Mrs. Davis' consent, to allow said wall to be built on her premises, was procured, on the condition that the person who should thereafter use said lot should be liable to pay for it." And, again, the jury found specially this further fact: "Her consent was procured by Mr. Swift, on condition that the person who should join on and use said wall should be chargeable for the same." The facts thus specially found by the jury, it seems to us, are utterly inconsistent with the alleged promise or agreement of appellee's decedent, as stated in either paragraph of appellant's complaint. These facts, thus found, show very conclusively to our minds, that the appellee's decedent, instead of making any promise or agreement, that she, or any one else, would pay the appellant any part of the cost or value of the party-wall, gave her consent to the erection of a part of the wall on her lot, on the express condition that she should not be liable for, nor chargeable with, any part of the cost or value of said wall.

In our opinion, therefore, the court below committed no error, in sustaining the appellee's motion for judgment in his favor on the special finding, notwithstanding the general verdict.

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The judgment of the court below is affirmed, at the appellant's costs.

THE BOARD OF COMM'RS OF ST. JOSEPH COUNTY v. RUCKMAN.

CONGRESSIONAL SCHOOL LANDS.—*Assessment of Taxes.—Refunding Taxes.—Repeal of Statute.—Vested Right.—Common Law.—Clause Saving Pending Actions.—Payment.*—Prior to the taking effect of the act of February 8th, 1877, (Acts 1877, Reg. Sess., p. 139,) "declaring school lands taxable after they have been sold and before deed is made," etc., an owner of certain of such lands filed his petition before the proper board of commissioners, asking the refunding of certain taxes paid thereon by him, alleged to have been assessed while held by a certificate of purchase, and before the same had been conveyed by deed. After such act had taken effect, on appeal to the circuit court, upon a special finding of the facts, in accord with the allegations of the petition, and as a conclusion of law thereon, judgment was rendered in favor of the petitioner.

Held, that taxes voluntarily paid are not recoverable, except by statute.

Held, also, that where a right of action, not existing at common law, is given by statute, a repeal of the same by another statute, containing no clause saving pending actions, takes away such right of action, in all such causes which have not proceeded to final judgment.

Held, also, that, prior to the taking effect of such statute of February 8th, 1877, such action could have been maintained under the provisions of the act of March 2d, 1853, (1 G. & H., p. 110,) "in relation to the refunding of taxes wrongfully assessed and collected."

Held, also, that the act of March 2d, 1853, so far as it authorized the refunding of illegal taxes on school lands, is repealed by the act of February 8th, 1877.

From the St. Joseph Circuit Court.

A. Anderson and L. Hubbard, for appellant.

T. S. Stanfield, J. H. Ellsworth, H. Brownlee and J. Brownlee, for appellee.

WORDEN, J.—The appellee filed his claim before the board of commissioners, at their December term, 1876, for the refunding to him of taxes paid by him on certain lands, in section 16, asking that the county portion be re-

57	96
136	139
136	210

57	96
167	28

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funded to him, and that the board order a proper certificate for the State's portion, which had been paid into the state treasury, for the purpose of auditing the same as a claim against the State.

The claim was properly verified.

The board declined, at that time, to hear evidence in support of the claim, and the cause went, by appeal, to the circuit court, where, at the May term thereof, 1877, it was tried by the court, who, upon proper request, found the facts specially, as follows :

"1st. That on the 25th day of November, 1853, the plaintiff, William Ruckman, purchased of the county auditor of St. Joseph county, Indiana, the following described parcels of land, to wit:" here certain lands in section 16, in St. Joseph county, are described ; "and took a certificate of purchase therefor. That on the 8th day of December, 1853, William Miller purchased lots," here certain other lands in section 16, in the same county, are described, "from said county auditor, and took a certificate of purchase therefor, which certificate said Miller afterward, in the same year, assigned to said Ruckman, but the legal title to said land remained in the inhabitants of said congressional township 38, until the 5th day of July, 1870, when the legal title to said land was, by the auditor of said county, conveyed to said Ruckman; and that, between the years 1853 and July, 1870, while the title to said land was in the inhabitants of said township, he was annually assessed with the state and county taxes upon said lands, and that during said period he paid state and county taxes as follows:" here follows a detailed statement of the taxes, the state taxes amounting to thirty-one dollars and eighty-nine cents, and the county taxes to fifty-nine dollars and ninety-three cents ; "which state, school and sinking-fund tax has been paid into the state treasury, and said county taxes have been paid into the county treasury of said county."

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As a conclusion of law upon the facts, the court found, "that the board of commissioners of St. Joseph county, Indiana, ought to have allowed, to be paid out of the county treasury, the sum of fifty-nine dollars and ninety-three cents, and that there should be certified to the auditor of state, for payment from the state treasury, the sum of thirty-one dollars and eighty-nine cents."

To this conclusion of law the appellant excepted, and judgment was rendered for the appellee.

Error is assigned upon the conclusion of law.

The first inquiry that seems to arise in the case is, by what right or authority can the appellee recover back, or have refunded to him, the taxes thus paid, assuming that the lands were not taxable? It must be assumed that the taxes were voluntarily paid, there being nothing in the finding showing that they were paid under compulsion, or even under protest.

Without some statutory provision, taxes thus paid can not be recovered back. *Jenks v. Lima Township*, 17 Ind. 326; *Martin v. Stanfield*, 17 Ind. 336; *Patterson v. Cox*, 25 Ind. 261; *The Town of Ligonier v. Ackerman*, 46 Ind. 552; *The Town of Edinburg v. Hackney*, 54 Ind. 83.

Hence, if the appellee had any legal right to have the amount thus paid by him refunded, some statute, and not any principle of the common law, gave him that right.

But in 1853 the following statutory provisions were enacted, which will be found in 1 G. & H. 110:

"Sec. 1. Be it enacted by the General Assembly of the State of Indiana, That in all cases where any person or persons, body politic or corporate shall appear before the board of commissioners of any county in this State, and establish by proper proof that such person, body politic or corporate has paid any amount of taxes which were wrongfully assessed against such person, body politic or corporate in such county, it shall be the duty of said board to order the amount so proved to have been paid,

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to be refunded to said payer from the county treasury so far as the same was assessed and paid for county taxes.

"Sec. 2. In all cases where a portion of the amount so wrongfully assessed and paid shall have been for state purposes, and shall have been paid into the state treasury, it shall be the duty of the said board of commissioners to certify the amount so proven to have been wrongfully paid to the auditor of state, under the seal of said board of commissioners, and the auditor of state shall thereupon audit the same as a claim against the treasury, and the treasurer of state shall pay the same out of any moneys not otherwise appropriated."

These provisions entitled the tax-payer to recover back money paid for taxes on land not taxable, as was held by this court in the case of *Henderson v. The State, ex rel. Overman*, 53 Ind. 60. But, pending the action in the court below, the Legislature enacted the following statute, approved February 8th, 1877, Acts 1877, Reg. Sess., p. 139:

"WHEREAS, Under the laws, as heretofore existing, congressional school lands were not taxable until sold, and a doubt has been raised where said lands have been disposed of, and deed has not been delivered, at what time said lands shall be deemed to have been or be sold, so that they would become liable to taxation; and

"WHEREAS, In cases where lands have been sold, part of the pay received, certificate of sale given or record entry made thereof in the proper office, as provided by law, and the purchaser has entered into possession, such lands have been deemed sold, have been assessed and appraised for taxation, and taxes have been levied and collected, as in cases of other land subject to taxation, which assessment, and levy, and collection, it is now claimed, were unauthorized; therefore,

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That in all cases where school lands have been sold and certificate has either been issued to the purchaser, or entered of record in the proper office,

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or otherwise, so the purchaser entered into possession and paid part or the whole of the purchase-money, or could have entered into occupancy, such sale shall be deemed and held a sale under the law, as much as it would be, had a deed been made and delivered, and the fee had been passed to the purchaser, and such lands shall be deemed and held as having been sold so as to make them liable to taxation within the meaning of the law, as fully and completely as they would have been had deed been delivered; and all appraisements of lands so sold, and all assessments of the same for taxes, and all levies and collections of taxes thereon, heretofore made, shall be and are hereby legalized and declared to be lawful and valid, and shall in nowise be subject to question by reason of such sale not having been consummated by execution and delivery of deed.

"Sec. 2. No treasurer shall refund any taxes paid, nor shall any board of county commissioners authorize the refunding or repayment of any taxes so levied or collected, nor shall any action be commenced or maintained in any court in this State, nor shall any court have jurisdiction to entertain any action brought to recover taxes so levied and collected as being illegal, by reason of such lands not having been sold, in any case contemplated in the first section of this act.

"Sec. 3. All school lands, which may be sold, shall be taxable from and after the sale and delivery of certificate, and as other lands, without regard to the delivery of deed of conveyance.

"Sec. 4. All laws conflicting with the provisions of this act are repealed.

"Sec. 5. Whereas, numerous claims are being made for return of taxes in the counties of this State, on the pretended illegality referred to in this act, an emergency exists for the immediate taking effect of this act, and it shall be in force from and after its passage."

The 2d section of the act of 1877 is explicit in its terms,

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and clearly cuts off any right of action in such cases as that embraced in the finding of the court. It not only provides, that no treasurer shall refund any taxes paid, nor shall any board of commissioners authorize the refunding or repayment of any taxes so levied or collected, but it also provides, that no action shall be commenced or *maintained* in any court in this State, to recover taxes so levied and collected as being illegal, by reason of such lands not having been sold, in any case contemplated by the 1st section of the act. And the 4th section of the act repeals all laws conflicting with the provisions of the act. There is no saving in the repealing clause of pending actions. Indeed, it is plain from the whole act, that the Legislature did not intend to save pending actions. The ground on which an emergency was declared to exist for putting the statute at once in force was, that numerous claims were being made for return of taxes, etc.

The act of 1853, then, so far as it applies to the case made by the finding of the court, was repealed by the act of 1877, while the action was pending. But, as the right of action depended upon the act of 1853, when that act was repealed, so far as it had any application to such case, by the act of 1877, the action could no longer be "maintained." Indeed, the act of 1877 took away the jurisdiction of the court to entertain any such action.

We think it abundantly established by the authorities, that when a right of action, not existing at common law, is given by statute, and the statute is repealed without any saving of pending actions, the repeal takes away the right of action in the pending causes, they not having proceeded to final judgment. "'The effect of a repealing statute,' says a very eminent judge, 'I take to be to obliterate the statute repealed as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law.'"

Hart v. The State.

Sedgwick on Stat. Constr., 2d ed., p. 108. See, also, cases cited on page 109, in note containing the proposition, that "Pending judicial proceedings based upon a statute, fall to the ground with its repeal."

It was within the constitutional power of the Legislature to repeal the act of 1853, without any saving of pending cases. The Legislature have the power and the right to take away by statute a remedy given by statute, unless rights have vested under the law before its repeal. *Covington, etc., R. R. Co. v. Kenton County Court*, 12 B. Mon. 144; *Rice v. Wright*, 46 Miss. 679.

There was no vested right to the repayment of the money, as long as the proceedings were pending, and before judgment. The law of 1853, giving the remedy, was not a contract, but a simple statutory provision, which might be repealed at any time, at the will of the Legislature.

We are of opinion, for these reasons, that the court below erred in its conclusions of law upon the facts found.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to render judgment on the findings in favor of the defendant below.

HART v. THE STATE.

CRIMINAL LAW.—Juror.—Competency.—Opinion.—Challenge.—In criminal causes in this State, it is the general rule, in relation to a challenge of a juror by the defendant for cause, that an opinion formed by the juror as to the guilt or innocence of the accused, based solely upon a newspaper account of the alleged crime, and which, in the belief of the juror, will not have any influence upon him in the trial of the cause, is not sufficient ground for challenge.

SAME.—Larceny.—Instruction to Jury.—On the trial of a defendant charged

Hart v. The State.

with larceny, the court instructed the jury, that, if the defendant snatched the property, alleged to have been stolen, from the hand of the owner, and retained it without the consent of the latter, this constituted larceny.

Held, that the instruction is erroneous.

Held, also, that, to constitute larceny, the taking must be with a felonious intent, existing at the time.

From the Clinton Circuit Court.

J. C. Suit and *J. U. Gorman*, for appellant.

C. A. Buskirk, Attorney General, and *H. C. Wills*, Prosecuting Attorney, for the State.

PERKINS, C. J.—Indictment of appellant for grand larceny. Conviction; new trial denied; sentence, and appeal.

The reasons assigned by appellant in his motion for a new trial were as follows:

1. Error of law in the court below, occurring at the trial, in overruling defendant's challenge for cause to John Hamilton, who was called as a juror, to which proper exceptions were taken;

2. Error of law in the court below, in giving to the jury trying the cause, of its own motion, the instructions numbered respectively, five, six, seven, eight, ten, eleven and twelve, to the giving of each of which the defendant saved the proper exception;

3. Error of the court below, in refusing to give to the jury trying the cause, on the motion of defendant, the instructions as asked, numbered respectively, four, five, six, nine and eleven, to the refusing of each of which a proper exception was saved;

4. Error of law and misconduct of the State's attorney, occurring at the trial, in the use of improper language in his closing argument, to which proper objections and exceptions were made;

5. Because the verdict of the jury was not sustained by sufficient evidence;

6. Because the verdict of the jury is contrary to the evidence given in the cause;

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7. Because the verdict of the jury is not supported by the evidence given in the cause; and,

8. Because the verdict of the jury is contrary to law.

The only error assigned in this court is the overruling of the motion for a new trial.

The first point argued by appellant's counsel is, as to the competency of John Hamilton as a juror.

The bill of exceptions recites, that, after this juror had been duly sworn to answer such questions as should be asked touching his competency to sit as a juror, in answer to such questions he stated, "that about the time at which the transaction occurred, on which the charge contained in the indictment was founded, he read an article in the Frankfort Crescent, a newspaper, which article purported to give a statement of the facts upon which the charge in the indictment was based; that, at the time he read said article, he formed an opinion concerning the guilt or innocence of the defendant, based upon the statement of facts contained in said article; and, in answer to further questions, then and there propounded by the defendant's attorney, further stated, that he still held the same opinion he had so previously formed as aforesaid." At this point in the examination, the defendant challenged and objected to the juror as incompetent, because of the opinion previously formed and still held; but the court overruled his challenge and objection, and the defendant excepted. The court then ordered the defendant's attorney to put to the juror the further question, "Is your mind as free and unbiased to act in the trial of this cause as if you had never read said article or heard of this cause before?" to which Hamilton answered, "I think it is." The defendant renewed his challenge for cause, which was again overruled, and the proper exception taken.

It has become the settled rule in this State, that an opinion as to the guilt or innocence of the defendant,

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founded upon newspaper accounts alone, and which, in the belief of said person, would not have any influence upon him in the trial of the cause, does not disqualify him to sit as a juror, upon the trial of such defendant. The cases are collected in *Scranton v. Stewart*, 52 Ind. 68. We are not inclined to change the rule.

Appellant's counsel next proceed to criticise the instructions of the court to the jury. The larceny charged in the indictment was the felonious taking of two bank-bills, of the denomination of twenty dollars each.

The court instructed the jury, that, "If the prosecuting witness had his pocket-book in his hand, and the bills in question in the book, or in his hand, and the defendant snatched such bills from the witness, and retained them without the consent of the prosecuting witness, this was larceny."

This instruction was erroneous.

The snatching of bills from a person having them in possession, and retaining them without the consent of such person, do not necessarily constitute larceny. To constitute this offence, the taking must be felonious, and the felonious intent must exist at the time of the taking. *Keely v. The State*, 14 Ind. 36; 2 Archb. Crim. Pr. & Pl., 8th ed., p. 1184.

Whether the taking was felonious or not, depended upon the intent, the purpose, in taking the property; and that intent was to be determined by the jury upon all the facts and circumstances of the case.

On the same page of the volume of Archbold cited, it is said: "In all cases of larceny, the questions—Whether the defendant took the goods knowingly or by mistake; whether he took them *bona fide*, under a claim of right, or otherwise; and whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether, and to appropriate or convert them to his own use—are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case."

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The error in giving the above instruction was not corrected. See *Kingen v. The State*, 45 Ind. 518.

As to larceny being included in robbery, see 2 R. S. 1876, p. 482, notes.

It is not necessary that we notice any other point made in the case.

The judgment is reversed; the prisoner to be returned to the county jail of Clinton for another trial.

THE STATE v. LIEBEN.

CRIMINAL LAW.—*Supreme Court.*—*Practice.*—*Brief.*—Unless a brief be filed by the appellant, on the appeal of a cause to the Supreme Court, it will be dismissed.

From the Porter Circuit Court.

T. J. Wood, Prosecuting Attorney, for the State.

WORDEN, J.—This was an information against the appellee for obstructing the execution of legal process.

On motion of the defendant, the information was quashed, and the State excepted. Judgment for the defendant, and appeal by the State.

The cause was submitted at the May term of this court, 1876.

There is no brief on file in the cause, nor does it appear that any has ever been filed.

The appeal is dismissed.

Whitworth *et al.* v. Sour.

WHITWORTH ET AL. v. SOUR.

57	107
141	306
57	107
145	617

PLEADING.—*Former Adjudication.—Promissory Note.—Dismissal.—Release.—*

In an action against the makers of a promissory note, the defendants filed an answer of former adjudication in an action by the plaintiff, against the defendants, before a justice of the peace, on the same note, wherein judgment was rendered against but one of the defendants, and that, on appeal by him to the circuit court, the action was there dismissed by the plaintiff.

Held, on demurrer, that the answer is insufficient.

Held, also, that such dismissal released none of the makers.

BILL OF EXCEPTIONS.—*Time.—Filing.—Time Granted after Term.*—The record of a cause appealed to the Supreme Court showed, that, in term time, a certain period had been granted within which to file a bill of exceptions, and that, after the expiration of such period and term, a bill of exceptions had been filed, showing that a longer time, not then expired, had been granted for such filing.

Held, that, after the expiration of the term, the judge had no power to grant any, or a longer, time for filing a bill of exceptions, and that it had not been filed in time.

From the Henry Circuit Court.

Brown & Brown and Forkner & Bundy, for appellants.

A. M. Grose and W. Grose, for appellee.

BIDDLE, J.—Complaint on a promissory note alleged to have been made by John L. McCorkle, William B. Whitworth and Benjamin Benbow, by the name and style of McCorkle & Co.

Whitworth and Benbow answered:

First. The general denial; and,

Second. That on the 29th day of April, 1874, the plaintiff in this action brought suit before a justice of the peace on the identical note sued on in this suit, and against these identical defendants, demanding judgment for two hundred dollars thereon; that all of these defendants, except John L. McCorkle, who was not served with process, appeared to said action, and submitted the same on the merits to said justice for final trial, and he, having heard all the evidence in the case, rendered judgment against the defendant Whitworth for one hundred

57	107
151	406

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and fifty dollars and ten cents, with interest and costs; that Whitworth appealed from that judgment to the circuit court, but, as to said plaintiff and Benbow, said judgment yet remains in full force and effect. That, after the case had been so appealed, the plaintiff, as to Whitworth, dismissed his cause of action; that said dismissal released Benbow; and that, he being thus released, Whitworth is also released.

To the second paragraph of answer a demurrer, stating a want of sufficient facts alleged, was sustained, and exception reserved.

There is no error in this ruling. The appeal by Whitworth from the judgment of the justice to the circuit court, and the dismissal of the cause therein by the plaintiff, did not discharge Whitworth from liability on the claim. The plaintiff could commence his suit again with the same legal rights as if no previous suit had been commenced. And there is no judgment stated to have been rendered against Benbow. For aught the answer shows, the case as to him might have been dismissed before the justice of the peace, or some other disposition made of it which did not discharge him from the debt. And how the dismissal of a pending suit in the circuit court against Whitworth could discharge Benbow from liability on the same claim, we do not perceive.

This is the only question presented in the record.

There was a jury trial, and a verdict found against the appellants, in the circuit court. A motion for a new trial was made by the appellee, overruled by the court, exception taken, and thirty days granted to file a bill of exceptions. The bill of exceptions was not filed until after the term of court had expired, and not within the thirty days granted by the court; but, in the bill of exceptions, it is stated, that "sixty days' time is given said defendants in which to prepare and file their bill of exceptions in said cause;" and the bill of exceptions was signed and filed within these sixty days. The question is therefore

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presented, whether the decision of the court in term, or the order of the judge at chambers, shall govern.

The statute (2 R. S. 1876, p. 176, sec. 343,) provides, that "time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court;" and we are of opinion that the court in term, only, can extend such time, and not the judge at chambers. When the time given for the signing of a bill of exceptions has expired, the power of the judge at chambers over it for that purpose is at an end. *Vanness v. Bradley*, 29 Ind. 388; *McElpatrick v. Coffroth*, 29 Ind. 37; *Vandoren v. Kimes*, 29 Ind. 582; *Roloson v. Herr*, 14 Ind. 539; *The New Albany and Salem R. R. Co. v. Wilson*, 16 Ind. 402; *Harrison v. Price*, 22 Ind. 165; *Earl v. Dresser*, 30 Ind. 11; *Thompson v. Eagleton*, 33 Ind. 300.

We think the bill of exceptions forms no part of the record.

The judgment is affirmed, with costs.

BLACK v. THE STATE.

CRIMINAL LAW.—Indictment.—Certainty.—Name.—Assault with Intent.—An indictment charged the defendant with having committed an assault and battery, with intent to commit a rape, upon a certain woman, alleging her surname in one place to be McKaskey, in another as McKlaskey, and finally as McKloskey.

Held, that the indictment is insufficient.

SAME.—Evidence.—Variance.—On the trial of the defendant on such indictment, the name of the person assaulted was shown by the evidence to be McCoskey.

Held, that a conviction of the defendant was erroneous.

From the Clay Circuit Court.

S. W. Curtis, for appellant.

C A Buskirk, Attorney General, for the State.

57	109
141	686

57	109
154	443
156	189

57	109
167	183

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Howk, J.—At the May term, 1875, of the court below, the appellant was indicted for an alleged assault and battery, with intent to commit a felony. Omitting the venue, the style of the court, and the signature of the prosecuting attorney, the indictment reads as follows:

“The grand jurors of Clay county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to inquire into felonies and certain misdemeanors, in and for the body of said county of Clay, in the name and by the authority of the State of Indiana, on their oaths present, that one John Black, late of said county, on the 3d day of August, A. D. 1874, at said county and State aforesaid, did then and there unlawfully, in and upon one Delana C. McKaskey, a woman, unlawfully, forcibly and feloniously, make an assault on her, the said Delana C. McKlaskey, did then and there unlawfully, forcibly, feloniously, and in a rude, insolent and angry manner, touch, beat, strike and wound, with the intent to then and there and thereby her, the said Delana C. McKloskey, unlawfully, forcibly, feloniously and against her will, to ravish and carnally know, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.”

At the May term, 1876, of the court below, the appellant appeared, in person and by counsel, and moved the court to quash said indictment, which motion was overruled, and to this decision the appellant excepted. And, having been arraigned on said indictment, for plea thereto, the appellant said, that he was not guilty as therein charged. The issues thus joined were tried by a jury in the court below, and a verdict was returned, finding the appellant guilty as charged in the indictment, and assessing his punishment at three years' imprisonment in the state-prison, and a fine in the sum of ten dollars. Appellant's motion for a new trial, on written causes therefor, was overruled by the court below, and his exception saved to

such decision; and judgment was then rendered on the verdict.

The appellant has assigned in this court the following alleged errors of the court below:

1st. In overruling his motion to quash the indictment; and,

2d. In overruling his motion for a new trial.

The first of these alleged errors presents for our consideration the sufficiency of the indictment against the appellant in this case. It is provided in the 54th section of our criminal code, that "The indictment or information must contain: * * * * *

"*Second.* A statement of the facts constituting the offence, in plain and concise language, without repetition." 2 R. S. 1876, p. 383.

The 55th section of the criminal code reads as follows: "The indictment or information must be direct and certain, as it regards the party, and the offence charged." 2 R. S. 1876, p. 384.

"The prosecutor or party injured, or any other person named in the indictment, if known, must be described with certainty; if an individual, he must be described by his christian and surname; if a corporation, by their name of incorporation." 1 Archb. Crim. Pr. & Pl., 8th ed., p. 245.

The object of setting out the name of the injured party is, to identify and give certainty to the particular fact or transaction on which the indictment is predicated.

The point is made in the case at bar, that the name of the party injured is not "described with certainty," in the indictment against the appellant. It seems to us, that this point is well taken. The indictment in this case charged the appellant with an assault on Delana C. McKaskey, a woman, with intent to ravish and carnally know Delana C. McKloskey, whose sex is not mentioned. The names, McKaskey and McKloskey, are certainly not *idem sonans*. In the case of *Ward v. The State*, 28 Ala.

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53, the "true rule" on this subject was said to be, "that if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial." But, in this case, it is impossible to give the two names, found in the indictment against the appellant, the same sound, without ignoring entirely the force and effect of two of the letters in the latter name. It is impossible to tell, from the indictment, with any degree of certainty, the true name of the injured party. And therefore we hold, that this indictment is not "direct and certain, as it regards * * * the offence charged," as our criminal code requires that it must be.

For the reasons given, in our opinion, the court below erred, in overruling the appellant's motion to quash the indictment.

The conclusion we have reached, in regard to the indictment, renders it unnecessary for us to consider and decide any other question, involved in this cause. It will not be improper for us to say, however, that the evidence on the trial of this cause, which is properly in the record, gives the injured party the name of Delana C. McCoskey, which name is at variance with each and all the names given in the indictment. Without going into any detailed examination of the questions presented by the second alleged error, we say generally, in conclusion, that, in our opinion, the court below erred, in overruling the appellant's motion for a new trial of this cause.

The judgment of the court below is reversed, and the cause remanded, with instructions to the court to sustain the appellant's motion to quash the indictment; and the clerk of this court will notify the warden of the state-prison to return the appellant to the custody of the sheriff of Clay county.

Robinson v. The State.

ROBINSON v. THE STATE.

CRIMINAL LAW.—Fornication.—Indictment.—Statute of Limitations.—Concealment of Offence.—Statute Construed.—An indictment for open and notorious fornication alleged that the defendant, during a time specified, more than two years prior to the finding of the indictment, had openly lived and cohabited with a certain unmarried woman, and had “concealed the fact of said crime until,” etc., “by publicly acknowledging and claiming the said” woman “to be his wife.”

Held, that the indictment is insufficient, the alleged concealment not being of the fact of the crime charged.

Held, also, that the mere denial, by the defendant, of having committed a crime charged, is not such a “concealment” as is contemplated by section 13 (2 R. S. 1876, p. 374,) of the act in relation to criminal pleading and practice.

From the Tippecanoe Circuit Court.

G. S. Orth and J. Park, for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—Indictment against the appellant, charging the offence in the following words: “That Hiram Robinson, on the 27th day of October, A. D. 1867, at the county and State aforesaid, and from that day until the 16th day of April, A. D. 1873, in said county and State, did then and there unlawfully live in open and notorious fornication, together with one Mary Watson, a woman, who was then and there, and during all said time, unmarried; he, the said Hiram Robinson, having concealed the fact of said crime, until the 30th day of May, A. D. 1877, by publicly acknowledging and claiming the said Mary Watson to be his wife.”

A motion to quash the indictment was overruled, and exception reserved. Plea of not guilty; trial by jury; verdict of guilty; fine of fifty dollars, and imprisonment in the county jail seven months. Over motions for a new trial and in arrest of judgment, and exceptions by the appellant, the court rendered judgment on the verdict.

Robinson v. The State.

The first error assigned is, overruling the appellant's motion to quash the indictment.

It appears upon the face of the indictment, by the dates alleged, and by the time it was filed, that the offence is barred by the statute of limitations, unless the allegation that the appellant concealed the fact of the crime is sufficient to take it out of the statute.

It has been held by this court, that the words, "conceals the fact of the crime," in section 13, 2 R. S. 1876, p. 374, must be held to mean the concealment of the fact that a crime had been committed, unconnected with the fact that the accused was the guilty perpetrator; and, further, the enactment evidently intends that the concealment of the fact of the crime must be the result of some positive act done by the accused, and calculated to prevent a discovery of the fact of the commission of the offence of which he stands charged. *Jones v. The State*, 14 Ind. 120; *The State v. Fries*, 53 Ind. 489.

In the case before us, the allegation of concealment does not show that the appellant concealed the fact of the crime, but that he merely acknowledged the affirmative of a fact which it was necessary for the State to negative. A fact is something which exists. The affirmation of something which does not exist is not concealing a fact which does exist. Nor was the thing so affirmed unconnected with the fact that the accused was the guilty perpetrator. Nor does the allegation show any positive act of concealment done, but merely the acknowledgment of a fact which the State alleges did not exist.

According to the construction of section 13, claimed by the State, the mere denial of guilt by the accused would be an act of concealment which would take a case out of the statute of limitations, and put the person charged in the dilemma of either admitting his guilt when accused, or abandoning his right under the statute. This, surely, can not be the meaning of the enactment.

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To apply our construction of the statute to the case before us, we think the acknowledgment by the appellant of Mary Watson as his wife was not a positive act which can be held to conceal the fact of the crime of open and notorious fornication. The indictment, in our opinion, is insufficient.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion to quash the indictment.

RUDOLPH v. LANE.

57	115
131	230
57	115
136	478

EVIDENCE.—Weight of.—Witness.—Supreme Court.—Courts ought not, as a rule, to weigh the evidence produced by the respective parties to a cause on trial, merely by the number of witnesses who may testify for each, but must determine which are the more worthy of belief; and, where the evidence is conflicting, such decision will not be disturbed by the Supreme Court on appeal.

SAME.—Parol Evidence of Contents of Writing Destroyed.—Parol evidence may be given of the contents of an instrument which has been destroyed, whether such destruction was done purposely, by accident, or by mistake.

SAME.—Fraud.—Where such destruction was done purposely, and apparently with a fraudulent design, parol evidence of its contents will not be permitted, without first introducing evidence rebutting the presumption of fraud.

From the Cass Circuit Court.

N. O. Ross, for appellant.

McConnell & Nelson, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellant, as defendant, before a justice of the peace of Cass county, in this State, upon the following cause of action:

“Daniel A. Rudolph to Sampson G. Lane, Dr.

“To cash loaned him on the 5th day of April,

1870, at Kokomo, Indiana . . . \$125 00

“Interest on same, at six per cent. per annum . 28 75

“Total . . . \$153 75”

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There was a judgment by default, before the justice, for the full amount of the claim, from which judgment an appeal was duly taken to the court below. The cause was tried by the court, without a jury, on the 2d day of December, 1875, and a finding was made in favor of the appellee and against the appellant, for the sum of one hundred and sixty-six dollars and eighty-seven cents. On written causes filed, the appellant moved the court below for a new trial, which motion was overruled, and to this decision the appellant excepted. And judgment was rendered by the court below upon its finding, from which judgment this appeal is now here prosecuted.

In this court, the appellant has assigned, as alleged error of the court below, the overruling of his motion for a new trial. The causes for a new trial, assigned by the appellant in his motion therefor, were as follows:

"1. The finding and decision of the court are not sustained by sufficient evidence, and are contrary to law; and,

"2. For error of law committed by the court on the trial of the cause, in permitting the plaintiff and N. J. Owens to testify to the contents of a written note or line, from the defendant to the plaintiff, which testimony was as follows:

"Sampson G. Lane, plaintiff:

"'On the 5th day of April, 1870, I was on the railroad, three miles north of Kokomo, when the train passed. The defendant was on the train, and dropped a piece of paper, which I picked up and read, and then handed it to Mr. Owens. It was destroyed. I destroyed it, because I had confidence in Mr. Rudolph. It requested me to loan him one hundred and twenty-five dollars for three or four days.'

"To which testimony, as to the contents of said note, the defendant at the time objected, and the court overruled the objection and permitted the witness to state its

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contents, to which ruling the defendant at the time excepted.

"N. J. Owens testified:

"I was present when the train passed, and the note was thrown off to Mr. Lane. Rudolph threw it off. It was written by pencil. Rudolph's name was signed to it. I read it, and then tore it up and threw it on the ground. I can not state the exact language of the note, but the purport of it was a request to loan him one hundred and twenty-five dollars for a few days. He stated he would be back on a certain train."

"To which evidence of the contents of said note, the defendant at the time objected. The court overruled the objection and admitted the evidence, to which the defendant at the time excepted."

In reference to the first cause for a new trial, appellant's learned counsel says, in his brief:

"The plaintiff, to make out his case, must establish by a preponderance of the evidence, that he loaned the money. This he has not done. He and the defendant stand alike interested in the event of the suit, and one states that the money was loaned, and the other that it was not. This leaves the case as if there was no evidence on the point, and the finding should have been for the defendant."

This conclusion by no means follows from the premises of the learned attorney. Courts do not, and ought not to, as a rule, weigh evidence by the number of witnesses testifying on each side. The evidence of one witness, even though a party, may, and often ought to, have more weight in the decision of the cause than the testimony of a dozen adverse witnesses. The court below must judge of the credibility of the different witnesses, and weigh and reconcile their clashing evidence; and, if their evidence can not be harmonized, the court below, or jury trying the cause, must determine which of the witnesses are the more worthy of belief. The conclusion arrived at

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by the triers of the facts, in cases of conflicting evidence, will always be respected and upheld by this court.

The second cause assigned by the appellant for a new trial of this action was the alleged error of law occurring at the trial, and excepted to at the time, in the admission of evidence as to the contents of the destroyed note, thrown from a train of cars by the appellant to the appellee. Appellant's counsel insists, "that where a party purposely, and not through mistake or inadvertence, destroys a writing, he may not afterward give parol evidence of its contents." This question is one of but little importance in this case. But, in our opinion, the learned counsel has not stated the law on this subject with his usual accuracy. Our understanding of the rule of evidence on this point is this, that where a party purposely, and apparently with a fraudulent design, destroys a writing, he will not be permitted to give parol evidence of its contents, without first introducing evidence to rebut the suspicion of fraud arising from his act. *The Count Joannes v. Bennett*, 5 Allen, 169; *Blade v. Noland*, 12 Wend. 173; *Riggs v. Tayloe*, 9 Wheat. 483.

In this case, however, we do not think that the act of the appellee, in destroying the appellant's note to him, was calculated to create even the slightest suspicion of any fraudulent design on the part of the appellee. And if it could be said, that even a shadow of suspicion might possibly arise from appellee's act in destroying said note, it was certainly rebutted and removed by the appellee's evidence, that he destroyed the note because he had confidence in the appellant.

In our opinion, no error was committed by the court below, in overruling appellant's motion for a new trial.

The judgment of the court below is affirmed, with ten per cent. damages, at the costs of the appellant.

 Stuttsman v. The State.

STUTTSMAN v. THE STATE.

CRIMINAL LAW.—Fish Law.—Affidavit.—An affidavit filed before a justice of the peace charged, that, "on or about" a certain day in April, in a certain year, at a certain county in this State, the defendant "did then and there unlawfully take one fish, with a spear, in and from" a certain river.

Held, that the affidavit is sufficient.

SAME.—Constitutional Law.—The act of February 22d, 1871, (2 R. S. 1876, p. 481,) "for the protection of fish," etc., is constitutional.

From the Elkhart Circuit Court.

J. A. S. Mitchell and *H. D. Wilson*, for appellant.

C. A. Buskirk, Attorney General, and *W. C. Glasgow*, Prosecuting Attorney, for the State.

PERKINS, C. J.—The following affidavit was made:

"State of Indiana, Elkhart county, set: Before me, Elbridge G. Chamberlain, a justice of the peace for said county, came Jacob Stuttsman, who, being duly affirmed according to law, deposeth and saith, that on or about the 25th day of April, in the year 1876, at the county of Elkhart, and State of Indiana, Abraham Stuttsman, late of said county, did then and there unlawfully take one fish, with a spear, in and from the Elkhart river, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State of Indiana.

"JACOB W. STUTTSMAN.

"Subscribed and sworn to before me this 10th day of May, 1876.

E. G. CHAMBERLAIN,

[SEAL.]

"J. P."

The defendant had a trial before the justice, and was fined five dollars.

He appealed to the circuit court.

In that court, a motion was made to quash the affidavit, but no cause therefor was specified. The motion was overruled; whereupon the cause was tried by a jury, verdict for the State, and a fine imposed upon the defendant of five dollars.

57	119
130	433
130	447
57	119
134	254
57	119
147	631

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A motion for a new trial was interposed, alleging that the verdict was not sustained by the evidence, and was contrary to law. The motion was overruled, and exception taken. The evidence is not in the record. A motion in arrest followed, alleging the insufficiency of the affidavit, which motion was also overruled, and exception taken. Appeal to this court.

The overruling of the motions above enumerated is here assigned for error.

We have a statute, enacting "That no person shall take any fish with a net, seine, gun, or trap of any kind, or set net, weir or pot, in any of the lakes, ponds, rivers, and small streams in this State, except as hereinafter provided. No person shall take any fish with a gig or spear during the months of March, April, May, November and December. Any person violating the provisions of this section, shall be subject to a fine for each fish so taken, [of?] not less than five nor more than twenty-five dollars: *Provided*, That the penalty in this section shall not be enforced against persons catching small minnows for bait with seines," etc. 2 R. S. 1876, p. 481, sec. 1.

This is all of the fish law that has any bearing upon the case before us.

It provides, that any person who takes a fish with a spear, in any of the rivers of this State, during the months named in the statute, shall be fined not less than five dollars, etc.

The defendant, in one of the months within which it was unlawful so to do, did, as we must presume in the absence of the evidence on which he was convicted, take a fish, with a spear, in and from one of the rivers of this State, with which offence he was properly charged in the affidavit on which he was prosecuted.

He violated the law and incurred its penalty.

His case does not fall within the proviso in the section copied. The fish law is constitutional and valid. *Gentile v. The State*, 29 Ind. 409; *The State v. Boone*, 30 Ind. 225.

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We see no alternative left us but to affirm the judgment of the court below.

Judgment affirmed, with costs.

GRANT v. WESTFALL.

SUPREME COURT.—*Assignment of Error.*—*New Trial.*—*Practice.*—An assignment as error of a ruling which is merely cause for a new trial, presents no question to the Supreme Court, on appeal.

SAME.—Every cause for a new trial, properly assigned in the motion therefor, is brought before the Supreme Court for review, by an assignment as error of the ruling of the lower court on such motion.

NEW TRIAL.—*Motion.*—*Evidence.*—*Practice.*—A motion for a new trial, based upon the alleged erroneous admission or exclusion of evidence, must clearly specify the evidence in question.

SAME.—*Instruction to Jury.*—A motion for a new trial, based upon the alleged erroneous giving or refusal of an instruction to the jury, must clearly specify the instruction in question.

SUPREME COURT.—*Verdict.*—*Weight of Evidence.*—*Practice.*—A verdict will not be disturbed by the Supreme Court, on appeal, where there is evidence tending to support it.

57	121
134	686
57	121
138	66
57	121
156	351

From the Vigo Circuit Court.

S. B. Gookins and *G. C. Duy*, for appellant.

S. C. Davis, *S. B. Davis*, *E. D. Seldomridge*, *J. P. Baird*,
C. Cruft and *J. N. Pierce*, for appellee.

Howk, J.—In this action the appellee was plaintiff, and the appellant and George Carico, sheriff of Vigo county, Indiana, were defendants, in the court below. In his complaint, the appellee alleged, in substance, that on the 9th day of December, 1870, Ann Westfall, Mortimer Westfall and Frank M. Westfall conveyed by warranty deed to the appellee the real estate in the city of Terre Haute, in said Vigo county, particularly described in said complaint; that afterward, on the — day of —, 1871, Daniel F. Gennett and others obtained a judgment, in the

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Vigo Common Pleas Court, in the sum of three hundred and forty-seven dollars and seven cents, against the said Ann, Mortimer and Frank M. Westfall; that at the September term, 1872, of the court below, the said Daniel F. Gennett and others commenced proceedings to have the said conveyance to the appellee set aside, and obtained a judgment against the said Westfalls and the appellee, setting aside said conveyance, and subjecting said real estate to the payment of the aforesaid judgment against said Ann, Mortimer and Frank M. Westfall; that afterward, on the 22d day of November, 1873, said real estate was sold on an execution or order of sale, to satisfy said judgment, and the said Gennett and others, the said judgment-plaintiffs, became the purchasers of said real estate, paying therefor the sum of — dollars, the exact amount of their judgment and costs, which sum was all they ever, at any time, paid for said property; that when said judgment-plaintiffs purchased said real estate, on said 22d day of November, 1873, they took a sheriff's certificate for a deed, which certificate entitled them to a deed within one year from that time from the sheriff, on conditions therein specified; that on the 21st day of November, 1874, and before the time of redemption had expired, the appellee paid the said Daniel F. Gennett and others, the said judgment-plaintiffs, the sum of four hundred and ninety-seven dollars and seven cents, the full amount of judgment, interests and costs, due said Gennett and others, on which said real estate was sold; that, at the time the appellee paid said money, he had no notice of any assignment of said sheriff's certificate, but paid the money in good faith to said judgment-plaintiffs, believing them to be the owners and holders of said claim and certificate; that the appellant claimed to hold said sheriff's certificate by assignment from said judgment-plaintiffs, and demanded that his codefendant, George Carico, then sheriff of Vigo county, should make him, on said certificate, a deed to said real estate, and threatened and was about to compel

said Carico, as such sheriff, to make such deed, and that said Carico, as such sheriff, was about to execute such deed to the appellant; and that the appellee was informed and believed that the appellant's title to said certificate was merely colorable, and that the assignment thereof to him was made without consideration; and that, if said Carico should make said deed to appellant, it would work irreparable injury to appellee. Wherefore appellee prayed for a temporary restraining order, and, on final hearing, for a perpetual injunction against said George Carico, sheriff, from executing said deed to appellant, that said sheriff's certificate might be cancelled, and for all other proper relief.

To appellee's complaint the appellant answered, admitting the allegations of the complaint, except that he denies that all the judgment-plaintiffs became the purchasers at said sheriff's sale of the real estate in controversy, but he avers that Theodore Schwartz, one of said judgment-plaintiffs, became such purchaser, and took the sheriff's certificate for a deed, which entitled him to a deed of said real estate, on the conditions therein specified; and the appellant averred, that on the 3d day of January, 1874, said Theodore Schwartz, by his written assignment on said certificate, for a valuable consideration paid in good faith, assigned said certificate to the appellant, and that from that time he had been the owner and holder of said certificate; that whether the appellee had paid said judgment-plaintiffs, before the time for redemption had expired, the sum of four hundred and ninety-seven dollars and seven cents, as stated in the complaint, was unknown to the appellant, but from the best of his information and belief he denied that the appellee had made such payment; and the appellant denied that said judgment-plaintiffs had any right or power to receive such payment, they having no interest in said certificate at the time of such alleged payment; and the appellant denied that his title to said certificate was merely color-

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ble, and he denied that it was made to him without consideration, and he averred that it was made upon a valuable consideration, paid in good faith by the appellant. And appellant admitted, that, as owner and holder of said certificate, he had demanded of the defendant Carico, then sheriff of Vigo county, that he make a deed to appellant of said real estate; and appellant asked that his answer be taken as a cross-bill against the appellee and said Carico, and that said Carico be required by an order of the court below to execute to appellant a deed of said real estate, pursuant to said certificate, and that his title thereto be quieted and confirmed, and for all proper relief.

To appellant's answer and cross-bill, appellee replied in two paragraphs:

1. A general denial; and,
2. In his second paragraph, the appellee alleged, in substance, that said judgment-plaintiffs, said Theodore Schwartz included, were partners at the time said judgment was taken, and said sale made on execution; that said judgment was a firm judgment, and the sale was for the benefit of the firm, and said Schwartz bid in said real estate for the firm, and paid nothing to his partners on said sale, and nothing to the sheriff except costs, which he paid with the firm money, and gave the sheriff the firm's receipt for principal and interest; that Isaac N. Pierce, an attorney of the court below, was employed by said firm to collect said debt from the appellee and other parties liable on said debt; that said Pierce obtained said judgment and decree to sell said real estate, and superintended said sale and made the bid for said Schwartz, and had a general employment to collect the amount due; that said Schwartz and said firm were all non-residents, and had no agent here to receive the money for redemption other than said Pierce, who was their agent and attorney for said purpose, and had never been discharged from his said employment; that appellee paid to said Pierce the full amount of the purchase-money and inter-

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est within the time for redemption, without any notice of an assignment to appellant, and fully believing that said Pierce was authorized to receive said money; and that the appellant, at the time said judgment was taken, and said sale was made, and said assignment was made to him, had an interest in and was a member of said firm. Wherefore, etc.

And the issues joined in this action were tried by a jury in the court below, and a verdict was returned for the appellee. On written causes, the appellant moved the court for a new trial, which motion was overruled, and appellant excepted, and judgment was rendered on the verdict.

The only alleged error of the court below, properly assigned by the appellant in this court, is the overruling of his motion for a new trial.

The appellee has also assigned, as alleged errors, the several causes for a new trial specified in his motion therefor; but this assignment was unnecessary and improper. Every cause for a new trial, properly specified in the motion therefor, is brought under review in this court by the simple assignment as error of the ruling of the court below on the motion for such new trial.

In this case, the causes for a new trial, in appellant's motion therefor addressed to the court below, were thus stated:

- "1. The court erred in admitting evidence offered by plaintiff, and objected to by defendant;
- "2. In excluding evidence offered by defendant, on plaintiff's objections;
- "3. The verdict of the jury is contrary to law and the evidence;
- "4. The court erred, in instructing the jury as prayed by the plaintiff; and,
- "5. The court erred, in refusing to instruct the jury as prayed by the defendant, and in changing and modi-

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giving instructions as prayed by the defendant, and in giving them as modified."

The first two of these alleged causes for a new trial were too vague, indefinite and uncertain to point out to the court below, with any sufficient precision, the rulings complained of, or to present to this court any question for our consideration. It has been repeatedly held by this court, that where a party complains of an alleged erroneous decision of the court trying the cause, either in the admission or exclusion of offered evidence, he must point out in his motion for a new trial, with reasonable certainty, the particular evidence admitted or excluded; otherwise the court below need not, and this court will not, consider such alleged erroneous decision. *Reeves v. Plough*, 41 Ind. 204; *Holding v. Smith*, 42 Ind. 536; *Betson v. The State, ex rel., etc.*, 47 Ind. 54; *Bowers v. Bowers*, 53 Ind. 430.

Under these authorities, and others to the same effect in our Reports, we are bound to hold, that the first and second causes for a new trial, assigned by appellant in his motion therefor in this action, were insufficient, by reason of their vagueness and uncertainty, and present no question for our consideration.

The same objections will apply with equal force to the fourth and fifth causes for a new trial, as specified in appellant's motion in this action. These two causes for a new trial complain of alleged errors of the court below in instructing, and in refusing to instruct, the jury trying the cause. This court has uniformly held for years past, that a motion for a new trial, on the ground of error of law, either in giving or in refusing to give instructions to the jury, must specify with reasonable certainty the particular instructions which the court erred in giving, and the particular instructions which the court erred in refusing to give. *Reeves v. Plough, supra*; *Bowman v. Phillips*, 47 Ind. 341; *Adams v. Holmes*, 48 Ind. 299; *Douglass v. Blankenship*, 50 Ind. 160.

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We think this requirement a wise and reasonable one, and we know of no good reason for changing the well-established rule.

This disposes of all the causes for a new trial, assigned in appellant's motion, except the third cause, that "the verdict of the jury is contrary to law and the evidence." The only question presented by this cause for a new trial is, whether or not the verdict of the jury is sustained by sufficient legal evidence. We think it is. There was evidence before the jury tending to sustain their verdict, and where this is the case, in our opinion we ought not to disturb the verdict.

The court below committed no error, in overruling the appellant's motion for a new trial.

The judgment of the court below is affirmed, at the costs of the appellant.

SCHOOLER v. THE STATE.

CRIMINAL LAW.—*Keeping Gambling Apparatus.*—*Evidence—Hearsay.*—Upon the trial of a defendant indicted for being "unlawfully the keeper of a certain faro-bank, for the purpose of wagering thereon articles of value," the court, over the objection of the defendant, permitted a witness on behalf of the State to testify that he had understood "from others, that the defendant" and another "were the owners of the faro-bank," and that he knew its ownership only "by hearsay."

Held, that the evidence was merely hearsay, and incompetent, and its admission erroneous.

From the Montgomery Circuit Court.

J. M. Thompson, W. H. Thompson and J. R. Courtney,
for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—Indictment against the appellant for being

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“unlawfully the keeper of a certain faro-bank, for the purpose of wagering thereon articles of value.”

No question is made upon the sufficiency of the indictment. Trial and conviction.

A question as to the competency of evidence is reserved in the record, for our consideration.

During the trial, the State offered to prove by a competent witness, “that he, the witness, had heard from other persons, and from rumor generally, that the defendant, Clay Schooler, and one Howard Wilson were the owners and keepers of the faro-bank; and that, in the room where the faro-bank was kept, [it] was generally understood and spoken of as the faro-bank of Schooler & Wilson, to which the defendant objected, on the ground that such testimony was only hearsay, and inadmissible for that reason. The attorney for the State then said he would bring the testimony home to the defendant, by showing that it was generally understood, in the room where the faro-bank was kept, that it belonged to the defendant and Wilson, and said faro-bank was so treated at all times, when the defendant was present in the room. The court then remarked that the testimony would be admitted, but that it could only be evidence against the defendant, in the event that he had knowledge of this understanding and rumor, that he was one of the owners of the faro-bank, and that it was treated as the faro-bank of himself and Wilson; and the court overruled the said objection, and permitted said witness to testify to the jury as follows: ‘I have understood from others that the defendant and one Howard Wilson were the owners of the faro-bank; I do not know who owned it, except by hearsay,’ to which ruling of the court, in admitting said testimony, the defendant at the time excepted.”

This evidence was improperly admitted. The witness did not state when, where, nor from what facts, he “understood from others that the defendant and one Howard Wilson were the owners of the faro-bank;” and if such

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understanding had been derived "from others" in the room where the faro-bank was kept, it would not have been competent evidence, unless the facts upon which the witness founded his understanding were stated and brought home to the knowledge of the defendant. The witness could not testify as to his understanding, but only to facts, leaving the jury to ascertain the proper understanding arising therefrom.

A question is also made upon overruling a motion by the appellant for a change of venue; and upon giving oral instructions to the jury by the court, over the objections of the appellant, and against his request that they should be in writing; but these questions will probably not arise again upon a new trial, and need not, therefore, be now examined.

For admitting incompetent testimony to the jury, upon the trial of the case, the judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

HEADRICK v. WISEHART.

NEW TRIAL.—*How many New Trials for Same Cause.*—*Practice.*—*Supreme Court.*—Where two new trials have been granted in the same cause, to the same party, by either the Circuit or Supreme Court, exclusively for any of the reasons specified in section 352 of the practice act, another new trial can not be granted to him for any of the reasons specified in such section; but even then the latter court may reverse a judgment for erroneous rulings of the court below on the pleadings, or on other matters which do not constitute reasons for a new trial, although the reversal may result in another trial of the cause on its merits.

VENDOR AND PURCHASER.—*Conveyance.*—*Consideration of, shown by Parol.*—*Taxes.*—*Warranty.*—*Statute of Frauds.*—In consideration of the conveyance of certain real estate, by quitclaim deed, by A. to B., and the promise of the former to pay all delinquent taxes due thereon, B. conveyed car-

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tain real estate to A., by warranty deed, and also promised to pay all delinquent taxes thereon. Afterward, B., to save the real estate conveyed to him by A. from sale for such taxes, paid the same, and then brought an action therefor against A.

Held, that each conveyance, and the promise accompanying it, were the consideration for the other conveyance and promise.

Held, also, that the plaintiff may show, by parol evidence, the actual consideration of his deed to the defendant, and that the same, or some part thereof, remains unpaid.

Held, also, that the taxes due on the land conveyed by B. were exempt from the operation of his warranty.

Held, also, that A.'s promise, to pay the taxes due on the land conveyed by him, is not within the statute of frauds.

From the Henry Circuit Court.

J. Brown and R. L. Polk, for appellant.

M. E. Forkner, E. H. Bundy and M. L. Bundy, for appellee.

Howk, J.—This cause is now before this court for the third time. It will be found reported, under its present title, the first time in 41 Ind. 87, and the second time in 48 Ind. 144.

When the cause was first here, PETTIT, C. J., delivered the opinion of this court, reversing the judgment of the court below, upon the ground that the evidence did not sustain the appellee's action for money paid by him for the use of the appellant. At the same time, OSBORN, J., filed an opinion agreeing to the reversal of the judgment upon the ground stated, but he said:

"I am not prepared to say that an action might not be sustained on a complaint stating the transaction detailed in the evidence, and predicating the action upon the contract to pay the taxes upon the lots as a part of the consideration for the Iowa lands."

When this cause was before this court for the second time, the judgment of the court below was reversed, upon the concession of appellee's counsel, "for the failure of the proof as to the amount of the taxes paid."

We need not restate the original pleadings in this

action, as these will be found fully stated in the report of the case in 41 Ind. 87.

When the cause was remanded to the court below, the appellee filed a second paragraph of his complaint, in which he alleged, in substance, that on the 1st day of January, 1870, he was the owner of a certain tract of land in Iowa, and the appellant owned town lots in the city of Anderson, Madison county, Indiana; that there were certain taxes in arrears and unpaid on the property owned by each one, and they agreed to exchange, and the appellee conveyed the Iowa land to the appellant, and the appellant conveyed the town lots, in said city of Anderson, to the appellee, and each put the other in possession of the property so conveyed; and it was further mutually agreed, as a part of the consideration for said exchange, that each one should pay all taxes which had accrued and were in arrears on the property by him conveyed; and the appellee averred, that there were in arrears and unpaid taxes on the Anderson city lots, conveyed to him by the appellant, to wit, the sum of six hundred dollars, which the appellant did not and would not pay; and by reason thereof the appellee, to save the property from tax sale, was compelled to, and did, pay the treasurer of said Madison county and the treasurer of said city of Anderson the said sum of six hundred dollars; whereby the appellee had sustained damages in the sum of six hundred and fifty dollars.

To this second paragraph of appellee's complaint, the appellant demurred, for the alleged want of sufficient facts therein to constitute a cause of action, which demurrer was overruled by the court below, and the appellant excepted to this decision.

The appellant separately answered each paragraph of appellee's complaint, in two paragraphs to the first paragraph of the complaint, and in three paragraphs to the second paragraph of the complaint.

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The first paragraph of each answer was a general denial.

The second paragraphs of the two answers were substantially alike, and it was alleged therein, in substance, that in the summer of 1869 the appellant sold and, by quitclaim deed, conveyed to appellee certain town property in the city of Anderson, Madison county, Indiana, describing it, and received in exchange a conveyance, by warranty deed, of certain real estate in Iowa, copies of which deeds were filed with, and made parts of, said answers, which deeds contained and represented all the writing of any kind ever made between them, pertaining to said exchange of property, or any contract or stipulation made concerning it or the taxes on said properties, or other liens thereon; that, if the appellant made any contract, provision or stipulation to pay the taxes on said Anderson property, it was made before the execution of said deeds, and was by parol and not in writing, and was made in and during the negotiation which resulted in said exchange of property and the execution of said deeds; and the appellant said that he made no promise, contract or stipulation to pay said taxes other than by parol, and at no time other than that above set out, and never at any time requested the appellee to pay said taxes.

In the third paragraph of the appellant's answer to the second paragraph of the appellee's complaint, the appellant alleged substantially the same facts that he alleged in the second paragraphs of his said answers.

The appellee demurred to the second paragraph of appellant's answer to the first paragraph of the complaint, and to the second and third paragraphs of the answer to the second paragraph of the complaint, for the want of sufficient facts in either of the said paragraphs of answer to constitute a defence, which demurrers were severally sustained by the court below, and to these decisions the appellant excepted.

At the April term, 1875, of the court below, the cause

was tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of six hundred and twenty-eight dollars and twenty-four cents; and, over the appellant's motion for a new trial and his exception saved, judgment was rendered on the verdict.

The appellant has assigned in this court as alleged errors, the decisions of the court below, in overruling his demurrer to the second paragraph of appellee's complaint, and in sustaining the appellee's demurrers to the second and third paragraphs of appellant's answers, and in overruling appellant's motion for a new trial.

Before proceeding to the consideration of any of the questions presented by these alleged errors, it is proper that we should first notice and dispose of a point made in argument by appellee's learned counsel. Appellee's counsel say: "We deny that there is any error occurring on the last trial of this cause; but should the court think there is, it is not available, for the reason that the appellant has already had two new trials granted him in this cause." In support of this point, the counsel cite that part of the eighth specification of section 352 of the practice act, which provides that "not more than two new trials shall be granted to the same party in the same cause." 2 R. S. 1876, p. 182. This provision of our code of practice was considered by this court, in the case of *Shirts v. Irons*, 47 Ind. 445. The conclusion then reached, which we fully approve, was thus stated, in the opinion of the court, by BUSKIRK, J.:

"We think the true rule is, that where two new trials have been granted in the same cause to the same party, either by the court below or by this court, exclusively for any of the reasons specified in section 352, another new trial can not be granted to the same party in such cause for any of the reasons specified in said section; but that this court may reverse a judgment for the erroneous rulings of the court below on the pleadings, or other matters which do not constitute reasons for a new trial,

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although such reversal may result in another trial in the court below upon the merits of the case."

The conclusion thus reached eliminates from our consideration, in the case at bar, the alleged error of the court below, in overruling the appellant's motion for a new trial; but it leaves for our examination and decision the questions presented by the other alleged errors, assigned by the appellant.

Without entering into any elaborate or detailed examination of the questions raised by the decisions of the court below, in overruling a demurrer to the second paragraph of the complaint, and in sustaining demurrers to the second and third paragraphs of the answer, it will suffice to say, that, in our opinion, all these questions are fully met and decided adversely to the appellant in this case, in the case of *McDill v. Gunn*, 43 Ind. 315. It is true, that in the case cited the conveyance was an ordinary warranty deed, but in so far as the encumbrance there in controversy was concerned, the conveyance was, in legal effect, merely a quitclaim deed, for there was no warranty against that encumbrance. The case at bar, as made by the pleadings in question, was simply this: The appellee conveyed his Iowa lands to appellant, and agreed to pay the taxes thereon. The appellee alleged, that the consideration for his said conveyance and agreement was the conveyance to him, by appellant, of the Anderson city lots, and the payment, by appellant, of the taxes on said lots. It is clear, we think, that the appellee might allege and prove, by parol evidence, the actual consideration of his deed to the appellant, and that this consideration, or some part thereof, had not been paid. But it is claimed in this case, as it was in *McDill v. Gunn*, *supra*, that the appellant's promise to pay the taxes on the Anderson city lots was a promise to pay the debt of another person, and was not binding on the appellant, because it was not in writing. This point is fully met and considered in the case last cited, and decided against

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the appellant's position. Under the pleadings, the appellant promised to pay the taxes on the Anderson city lots as a part of the purchase-money for the Iowa lands, or, in other words, to pay a part of his debt to appellee for said lands by the payment of said taxes. Such a promise is not within the statute of frauds, and need not be in writing to make it binding on the appellant. See, also, *Helms v. Kearns*, 40 Ind. 124; *Berkshire v. Young*, 45 Ind. 461, and authorities cited; and *Crim v. Fitch*, 53 Ind. 214.

In our opinion, no error was committed by the court below, either in overruling appellant's demurrer to the second paragraph of the complaint, or in sustaining the demurrers of the appellee to the second and third paragraphs of the answers.

The judgment of the court below is affirmed, at the appellant's costs.

CLARK v. THE CONTINENTAL IMPROVEMENT CO. ET AL.

CONTRACT.—*Consideration.*—*Tender.*—*Subscription.*—*Railroad.*—*Appeal.*—*Parties.*—*Assignment of Error.*—*Waiver.*—*Supreme Court.*—By an obligation payable to a certain person or bearer, the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a certain railroad company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum, which he promised to pay in instalments as the construction of the road-bed of such railroad progressed, in proportion to monthly estimates thereof, and that the whole should be paid on the completion of such road-bed.

Held, in an action on such obligation, by an assignee against the maker, that no tender of such stock need have been made to maintain an action for any single monthly instalment.

Held, also, that an action for the whole of such sum can not be maintained without such tender having first been made.

Held, also, that such obligation was not a subscription to the capital stock of such company.

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Held, also, that the one dollar, confessed in such obligation to have been received by the defendant, is too insignificant a part of the consideration to waive a tender of such stock, in an action to recover the whole principal.

Held, also, such railroad company having been made a party defendant in such action, but no judgment having been rendered against it below, that it need not be made a party to, nor served with notice of, an appeal to the Supreme Court.

Held, also, that a failure to give notice to the company of such appeal is ground for setting aside a submission of the cause on default, but not for a dismissal of the appeal.

Held, also, the company having been, by the assignment of errors, made an appellee instead of an appellant, that such assignment is informal, but a failure to object thereto is a waiver of such informality.

From the DeKalb Circuit Court.

J. Morris, R. W. McBride and J. L. Morlan, for appellant.

A. A. Chapin, for appellees.

WORDEN, J.—The Continental Improvement Company, as the holder of the following bond by equitable assignment, sued the appellant, Clark, as the maker thereof, viz.:

“Know all men by these presents, that I, O. C. Clark, of Noble county, and State of Indiana, in consideration of two shares in the capital stock of the Grand Rapids and Indiana Railroad Company, to be delivered to me by said company upon the payment of the sum of money herein specified, and in consideration of the sum of one dollar to me in hand paid by said company, the receipt whereof is hereby confessed, I do hereby acknowledge myself indebted and bound to Samuel Hanna, or bearer, in the sum of two hundred dollars, for so much money by him to be procured to aid in the construction of the division of said company’s road lying between the city of Fort Wayne and Kendallville, which sum I promise to pay to said Samuel Hanna, or the bearer hereof, as the work on the said road-bed of said division shall be prosecuted, and in proportion to each monthly estimate, until the whole amount shall be fully paid; which sum I prom-

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ise to pay in full as soon as the road-bed of said division shall be put in readiness for laying the rails thereon.

"In witness whereof I have hereunto set my hand and seal, this 10th day of April, A. D. 1866.

[SEAL.]

"O. C. CLARK."

There was an answer, amongst other things, of general denial, and the cause was tried by the court, who found for the plaintiff for the full amount of the bond and some interest, and rendered judgment accordingly, over a motion for a new trial.

It appears by the admission of the parties, which was made evidence in the cause, that the stock mentioned in the bond had not been delivered or tendered to the defendant before the action was brought, but that, after the action had been commenced, the plaintiff made a tender of the same to him in open court.

The only question made here by the appellant, as we understand the brief of counsel, is, whether the action can be maintained, no tender of the stock, either conditional or otherwise, having been made before the commencement of the action.

If the action had been brought to recover any of the monthly instalments stipulated for, before the whole sum became due, no tender would have been necessary, because the stock was to be delivered to the defendant only upon the payment of the sum of money specified in the bond, that is, the whole sum. But the action was not for any instalment merely, but for the whole sum, and was based upon the theory that the whole sum had become due by the terms of the bond. For the purpose, then, of determining the questions involved, we think the case must be regarded as if no monthly payments in proportion to estimates had been provided for in the bond, but that the whole sum was to become due upon the completion of the work as stipulated for. *Cox v. Hazard*, 7 Blackf. 408.

We are of opinion, that the action could not be maintained without a tender of the stock previous to its com-

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mencement; not an unconditional tender, but a tender upon condition of payment. Until such tender was made, the plaintiff had no complete cause of action, for the stock was to be delivered to the defendant upon the payment of the money.

In the case of *Mix v. Ellsworth*, 5 Ind. 517, suit was brought on the only unpaid obligation given for the purchase-money for a certain lot, which was to be conveyed on payment of the obligations; and it was held, that the suit could not be maintained, unless, before it was commenced, a tender of conveyance on payment was made.

Numerous authorities are cited in the case. We pass over any intermediate authorities upon the point, and notice the case of *Summers v. Sleeth*, 45 Ind. 598.

In that case, a note was given to a railroad company for one hundred and fifty dollars, closing in these words: "For which said railroad is to issue to me the amount in the capital stock of said company, on the payment of said one hundred and fifty dollars." It was held, that the action could not be maintained in the absence of a tender of the stock before it was brought.

There is no analogy between the case here and that of an ordinary subscription to the capital stock of a railroad company, on which an action may be maintained without having tendered the certificates for the stock. Payment of an ordinary subscription to the capital stock makes the subscriber a stockholder, even if the subscription does not, and he can always demand and obtain the proper certificate. But payment of the obligation sued on would not make the defendant a stockholder in the Grand Rapids and Indiana Railroad Company. The obligation is not a subscription to the capital stock of the company, and he can not become a stockholder by payment of the obligation sued on, unless the stock is transferred to him.

But it is urged by counsel for the appellee, that there is another principle of law which will uphold the action, though no tender of the stock was made before the action

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was brought. That principle is stated in the following terms, in the case of *Morton v. Kane*, 18 Ind. 191 :

“Where the plaintiff’s agreement or stipulation constitutes only a part of the consideration of defendant’s contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff may be compensated in damages, an action may be supported on the contract without showing strict performance by the plaintiff.”

There were two, and only two, considerations for the defendant’s obligation, viz., the two shares of stock to be delivered to him, and the dollar paid him as “confessed” in the obligation. Perhaps it may be conceived that the motive of the defendant in executing the bond was to secure the construction of the road, whereby he might be benefited, but that constituted no part of the consideration. The motive prompting one to execute a contract, and the consideration of the contract, are entirely different things. There were, as we have said, but two considerations for the defendant’s obligation, the main and important one, as it seems to us, being the stock which he was to receive on payment of the money; the other being the nominal one of a dollar confessed to have been received. The plaintiff having failed to perform, or offer to perform, the obligation resting upon it, before it could become entitled to the money, viz., having failed to tender the stock, and this constituting the substantial consideration for the defendant’s obligation, we are of opinion that the case is not a proper one for the application of the doctrine contended for. The dollar received is too insignificant a part of the consideration to make it the basis of a recovery, without a performance of, or offer to perform, the substantial part. And this view is sustained by authority.

In 2 Smith Lead. Cases, by Hare & Wallace, p. 26, it is said, that the cases of *Tompkins v. Elliot*, 5 Wend. 496, and *Weaver v. Childress*, 3 Stewart, 361, were de-

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cided upon the ground that a principal part of the consideration had been received and enjoyed; and in speaking of another case, which we find to be that of *Jones v. Marsh*, 22 Vt. 144, it is said, that the court noted the fact that the cases proceed on the ground that a principal part of the consideration had been enjoyed. The case of *Jones v. Marsh*, *supra*, was this: Jones contracted with Marsh for certain cheese at seven cents per pound, to be delivered by the latter to the former at a place and future time specified, and paid him fifty dollars on the contract. Marsh had the cheese ready at the time and place specified for delivery, but Jones did not appear to receive or pay for it, and, after keeping it several days, Marsh sold it for less than seven cents per pound, suffering a loss on it of seventy dollars. In an action by Jones on the contract to recover back his fifty dollars, on the ground that Marsh had not delivered the cheese, it was held that he could not recover. In respect to the point here involved, the court said: "But it is said, that although the promises of the parties are mutual and dependent, yet, inasmuch as part of the consideration has been accepted and enjoyed by the defendant, and the plaintiff has no other remedy than upon the agreement, and inasmuch as the plaintiff's failure to perform his part of the contract can be compensated in damages, the plaintiff should be allowed to recover, without alleging performance of the remainder. And some few authorities are cited by the plaintiff, as sustaining this doctrine. These cases, however, proceed upon the ground, that the *principal* part of the consideration had been received and enjoyed." In the case cited, it will be seen that the defendant had received fifty dollars, while in the case before us he has received but one dollar.

We are of opinion, that a new trial should have been granted.

Before closing this opinion, we notice a point made by the appellee.

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It has made a motion to dismiss the appeal, because process was not served in this court upon the Grand Rapids and Indiana Railroad Company. The railroad company named was made a defendant below, as the equitable assignor of the bond sued on, but no judgment of any kind was taken against it. The railroad company was not a proper appellee in this court, and there was, therefore, no need of service of process upon it. But, if it were otherwise, it is not seen how a failure to serve process upon it could be ground of dismissing the appeal. It might be ground of setting aside the submission, as the cause was submitted on default.

There is an informality in the assignment of errors, in this, that the errors are assigned in the name of Clark, as appellant, against the Continental Improvement Company and the Grand Rapids and Indiana Railroad Company, as appellees. If the latter company had been named at all in the assignment of errors, it should have been named as an appellant.

But no objection is made to the assignment of errors; and, in the absence of objection, we think it abundantly sufficient.

The judgment below is reversed, at the costs of the appellee The Continental Improvement Company, and the cause remanded for a new trial.

HUNT v. MILLIGAN.

COUNTY CLERK.—*Partition.*—*Personal Liability for Money Received Without Official Authority.*—*Payment.*—Where a commissioner appointed by a court makes sale of real estate involved in a partition suit, and pays the proceeds thereof over to the clerk of such court for distribution to the parties interested, any one of the latter may maintain an action against such clerk personally, as for money had and received, for the portion due

57	141
168	447
168	581

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him as specified in the decree of partition, and an over-payment, out of such proceeds, to another of such parties, is no defence in such action.

SUPREME COURT.—*New Trial*.—*Excessive Damages*.—*Practice*.—Where excessive damages is not assigned as cause in a motion for a new trial, the Supreme Court, on appeal, will not disturb the judgment, though it appear from the evidence that the damages assessed were excessive.

From the Parke Circuit Court.

A. F. White and D. H. Maxwell, for appellant.

S. F. Maxwell and S. D. Puett, for appellee.

PERKINS, C. J.—The main facts of this case are recited in that of *Milligan v. Poole*, 35 Ind. 64. Buchanan and Milligan were tenants in common, each owning an undivided half of a piece of real estate. Milligan sold his undivided half to Poole and Magill, by title-bond requiring him to make a deed to it when the half should be paid for. Poole and Magill paid eight hundred dollars, being a part of the purchase-money.

At this point Buchanan instituted proceedings for partition, making Milligan, Poole and Magill parties.

Commissioners reported the property not divisible, and it was ordered to be sold. Oldshoe was appointed to make the sale, and ordered to pay one-half of the proceeds to Buchanan, and to divide the other half between Milligan, Poole and Magill, according to their equitable interests in the half of the real estate, the proportions being specified. The commissioner, Oldshoe, sold the real estate, paid Buchanan his half, and paid the other half to Hunt, the appellant, who was then clerk of the court, to pay to Milligan.

Hunt says: "On the 21st day of September, 1871, I paid Milligan nineteen hundred dollars, and there is yet due him, under the last finding of the court, one hundred and four dollars, but having paid Magill and Poole two hundred and one dollars and sixty-eight cents, there is not enough left in my hands to pay Milligan that amount." Appellant, Hunt, has not caused this last order of the court to

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be copied into the record. Hence, this court is ignorant of its terms.

This was a suit by Milligan against Hunt, for money had and received by the latter to the use of the former.

The complaint was sufficient.

The court found for the plaintiff one hundred and four dollars.

It is claimed that the law did not authorize the clerk, as clerk, to receive the money in question, and that, hence, he is not liable for it.

But the clerk received the money, not in his official, but in his individual, capacity, and in that capacity he might be liable for it to the person to whom it belonged. *The State, ex rel., etc., v. Givan*, 45 Ind. 267.

If a person receives money from one man to pay to a third, the promise, express or implied, enures to the benefit of such third person, and he may maintain an action for the money. *Beals v. Beals*, 20 Ind. 163; *McDill v. Gunn*, 43 Ind. 315.

Hunt, the appellant, in his testimony above copied, seems to admit that he had an amount in his hands belonging to Milligan; he fails to fix the amount, but says it was less than one hundred and four dollars. By our calculation, it was a little less than sixty dollars.

Excessive damages was not made a ground in the motion for a new trial.

It is claimed by the appellee, that this sixty dollars was wrongfully paid to Magill and Poole. It was a question for the court or jury trying the cause, whether, upon the evidence, the defendant was liable for this money.

Maxwell, attorney of Milligan and a witness, testified, that he notified the defendant not to pay the amount he did to Magill and Poole, before he made the payment, but told him to pay it to Milligan.

Defendant denies this statement. The court below appears to have given the case much consideration, and we can not say the judgment below was erroneous.

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The judgment of the court below is affirmed, with costs.

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CRIMINAL LAW.—Forgery.—Indictment.—Name.—Arrest of Judgment.—An indictment for forgery charged the defendant with having uttered and published “as true, to one” A. B., “a certain false, forged and counterfeit promissory note for the payment of money,” setting out a copy of a promissory note, payable to the defendant and purporting to be executed by one “‘S. B. Skinner,’ with intent to defraud one Solomon B. Skinner,” etc.

Held, that it should have been alleged, and can not be inferred, that the person by whom such instrument purports to have been executed is the same person as the one whom it is alleged it was intended to defraud, and that the indictment is therefore insufficient on motion in arrest.

SAME.—Intent.—Whether an indictment for forgery is for committing the original forgery, or for uttering the forged paper as true, the intent may be laid to be to defraud the person whose name has been forged.

From the Blackford Circuit Court.

A. Steele and *R. T. St. John*, for appellant.

C. A. Buskirk, Attorney General, for the State.

Howk, J.—At the October term, 1877, of the court below, the appellant was indicted for forgery. Upon an arraignment and plea of not guilty, the appellant was tried by a jury, in the court below, and a verdict was returned, finding him guilty as charged in the second count of the indictment, and assessing his punishment at imprisonment in the state-prison for the term of two years, and a fine of five dollars.

The indictment was in two counts, but, by the verdict of the jury, the appellant was found not guilty as charged in the first count.

Our consideration of this cause will therefore be limited to the second count of the indictment against the appellant, and the proceedings had thereon in the court

below. Omitting introductory and formal matters, the second count of the indictment was as follows:

"And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge, that the said Henry L. Shinn, afterwards, to wit, on the day and year aforesaid and at the county and State aforesaid, unlawfully and feloniously, did utter and publish as true, to one Henderson S. Moler, as agent and salesman of the firm of Charles A. Clouser and Company, composed of Charles A. Clouser and Henderson S. Moler, as partners of said firm, a certain false, forged and counterfeit promissory note for the payment of money, which said last mentioned false, forged and counterfeit note is of the tenor following, to wit, that is to say:

"\$148.00. HARTFORD CITY, INDIANA, May 7th, 1877.

"Six months after date, for value received, I promise to pay H. L. Shinn, or order, at Sweetser & Matler's Bank, Hartford City, Ind., one hundred and forty-eight dollars, with interest at the rate of ten per cent. per annum after maturity and attorney fees, value received, without any relief whatever from valuation or appraisement laws; the drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note, and all defences on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them.

[Signed.]

"S. B. SKINNER.

"No. ——. Due, ———."

"With intent to defraud one Solomon B. Skinner, he, the said Henry L. Shinn, then and there, at the time he so uttered and published the said last-mentioned forged promissory note, as aforesaid, well knowing the same to be false, forged and counterfeit, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

Upon the return of the verdict against him, the appeal—
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lant moved the court below, in writing, for a new trial; which motion was overruled, and to this decision the appellant excepted. And the appellant also moved the court, in writing, in arrest of judgment, and this motion having been overruled and appellant's exception saved thereto, judgment was rendered on the verdict.

In this court, the appellant has assigned the following alleged errors of the court below :

1st. In overruling his motion for a new trial ; and,

2d. In overruling his motion in arrest of judgment.

We will first consider and decide the questions presented by the second of these alleged errors. The appellant moved the court below in arrest of judgment in this cause, upon the following grounds :

"1st. The second paragraph of said indictment is insufficient in this : that said paragraph does not state facts sufficient to constitute a crime by said defendant ;

"2d. Said paragraph does not aver or show, that the Solomon B. Skinner named in the indictment is the 'S. B. Skinner' whose name appears to the note ;

"3d. Said paragraph does not aver or state, that the Solomon B. Skinner, who was intended to be defrauded, was the 'S. B. Skinner' whose name appears on the note alleged to be forged ;

"4th. The allegation, that the intent was to defraud Solomon B. Skinner, is insufficient. The allegation should have been, with intent to defraud Clouser & Moler."

It seems very clear to us, that the first three of these grounds for an arrest of judgment in this case were well assigned. It can not be inferred, either as matter of fact or of law, that Solomon B. Skinner was the person meant or intended by the name, "S. B. Skinner," which was subscribed to the note on which the charge of forgery was predicated. So far as mere inference can go, and that is all, apparently, that is relied upon in the second count of the indictment, it would be just as reasonable to infer that Stephen, Silas, Solon, Smith, Samuel

or Saul B. Skinner was the person meant or intended by the name, "S. B. Skinner," as to infer that Solomon B. Skinner was the person thereby meant and intended. Such a matter as this ought not, in our opinion, to be left to mere inference, in an indictment. It ought to be made certain and definite, by a positive averment of the fact. It seems to us, therefore, that when it was charged, in the second count of the indictment, that the appellant had uttered and published as true the promissory note set out therein, signed S. B. Skinner, "with intent to defraud one Solomon B. Skinner," it should also have been averred, in said second count, that said Solomon B. Skinner was the person meant and intended by the name, "S. B. Skinner," subscribed to said note. *Rex v. Barton*, 1 Moody, 141; *Bicknell Crim. Pr.* 360.

The law seems to be well settled, "that, whether the indictment is for committing the original forgery, or for passing the forged paper as good, the intent may be laid to be to defraud the person whose name is forged." 2 *Bishop Crim. Procedure*, sec. 422. But the difficulty with the second count of the indictment, in the case at bar, is this: that while the intent is therein laid to be, "to defraud one Solomon B. Skinner," yet it is not averred, in said second count, that his name is the name that was forged, and this fact, if it be the fact, could not even be inferred, with any certainty, from the name signed to the alleged forged note.

For the reasons given, the second count of the indictment, in this case, was radically and fatally defective; and, therefore, we hold that the court below erred, in overruling the appellant's motion in arrest of judgment. This conclusion will render it unnecessary for us to consider and decide the questions presented by the first alleged error.

The judgment of the court below is reversed, and the cause is remanded, with instructions to sustain the appellant's motion in arrest of judgment, and for further pro-

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ceedings; and the clerk of this court will issue notice to the warden of the proper prison to return the appellant to the custody of the sheriff of Blackford county.

MADDY v. THE SULPHUR SPRINGS AND WESTERN TURNPIKE CO.

PROMISSORY NOTE.—Pleading.—Turnpike.—Assessment.—Failure to List Lands.—Estoppel.—The defendant in an action by a turnpike company, as payee, on a promissory note, answered, admitting the execution of such note, and alleging that the consideration of the same was an assessment upon his real estate, to aid in the construction of the plaintiff's road, but averring that the same was void, on account of the fact that the assessors of benefits for the plaintiff's road had omitted to list and assess certain lands within one and one-half miles of such road, and that, at the time such note was executed, the defendant did not know of such omission.

Held, on demurrer, that the answer is sufficient.

Held, also, that the defendant is not estopped, by having executed the note in suit, from attacking the validity of such assessment.

Held, also, that, if such assessment has since been perfected, that fact should be replied.

From the Henry Circuit Court.

A. M. Grose and W. Grose, for appellant.

M. E. Forkner and E. H. Bundy, for appellee.

PERKINS, C. J.—Suit by the appellee, against the appellant, upon a promissory note for thirty-six dollars, averred in the complaint to have been made by the appellant, payable to the appellee, by the name of "H. Minesinger, Tr. S. S. & W. Tp. Co." A copy of the note was filed with the complaint as part thereof.

The note was dated November 23d, 1869.

A demurrer to the complaint was overruled, and exception taken.

Answer as follows:

"The defendant says that the note sued on was exe-

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cuted for an assessment upon the defendant's lands for the construction of the turnpike road of the plaintiff, under and by virtue of the act of the Legislature, approved March 11th, 1867, touching the construction of plank and gravel roads, etc., and for no other consideration; that said turnpike road and the route thereof were as follows: Commencing at the road running north and south through the town of Sulphur Springs, in said county of Henry, running thence due west on the section line, as near as practicable, until it intersects the Middletown and Mechanicsburg Turnpike at the Wilhoit school-house, a distance of four and one-half miles; that, in making said assessment for the plaintiff's road, the assessors wholly omitted to list and assess the benefits to or on any of the lands adjacent to, and within one and a half miles east of, the eastern end and terminus of said road, resulting from the making and construction of said road, nor have the lands east of, and adjacent to, the eastern terminus of said road, ever been listed, or the benefits to said lands, accruing from the construction of said road, been assessed; that, at the time of giving said note, defendant was entirely ignorant of the fact that said lands had not been assessed," etc.

Demurrer to this answer sustained, the ruling excepted to, and, the defendant declining to answer further, the plaintiff had judgment, from which the defendant appealed, etc.

It is assigned for error, that the court erred in sustaining the demurrer to the defendant's answer.

The act of 1867 above referred to requires, that "The amount of benefit to each tract of land within one and one-half miles of such road on either side thereof, or within the like distance of the terminus thereof," shall be assessed. Acts 1867, Reg. Sess., p. 167, sec. 1.

The answer avers that lands liable by this statute to be, were not, assessed.

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In *The Greensburgh, Milford and Hope Turnpike Co. v. Sidener*, 40 Ind. 424, it is said:

"It has been repeatedly decided by this court, that where assessors, appointed under the act providing for assessments on lands to aid in the construction of roads, omitted, in the list returned by them, any land within one and one-half miles from the proposed road, their entire assessment is void, and an injunction will lie to prevent its collection."

Many authorities are cited in which such decision was made.

If the assessment was void, the note given for it was without consideration. But counsel for the appellee say the assessment may have been perfected. The answer avers, substantially, that it had not been at the time the answer was filed, and it was filed in May, 1875, six years and six months subsequent to the execution of the note, which must have been executed some time subsequent to the assessment.

If the assessment had been perfected, it should have been shown in a reply.

But it is further argued, that, if the assessment has not been perfected, it may yet be; that it can not, therefore, be said to be void, but only voidable. See *Hopkins v. The Greensburg, etc., Turnpike Co.*, 46 Ind. 187.

Conceding this to be so, who is to avoid it? Certainly; the person against whom the voidable assessment is made may do so. The maker of this note is such a person. If this suit were upon the assessment, he could, by interposing the defence, avoid the assessment, and defeat the suit. But it is urged that he is estopped, by the giving of the note, to attack the assessment. The answer to this proposition is the fact, that, when he gave the note, he had no knowledge of the defect in the assessment.

The turnpike company should have had their assessment perfected, whereby it would have been validated, before the institution of this suit.

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The judgment is reversed, with costs, and the cause remanded, etc.

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PRINCIPAL AND SURETY.—Delivery Bond.—Action.—Sale of Surety's Property.

—Where the real estate of the surety has been levied upon and sold at sheriff's sale, on an execution issued upon a judgment rendered against the principal and surety in a delivery bond, in an action thereon for a breach of its condition, the latter may, in an action against the former, recover as for money paid to his use.

From the Greene Circuit Court.

A. G. Cavins and *E. H. C. Cavins*, for appellant.

BIDDLE, J.—Suit by the appellee, against Elisha Collins and Samuel Howard, to recover for money paid to their use.

Only Collins answered.

General denial. Trial by the court upon an agreed statement of facts, which, unincumbered by dates and formalities, may be stated as follows:

Moses F. Dunn recovered a judgment against Elisha Collins and Samuel Howard, for one thousand three hundred and thirty-four dollars and eighty cents. Execution was issued on the judgment, and a levy made upon a quantity of corn, the property of Collins. A delivery bond for the corn was executed by Howard, W. D. Harris and the appellee. The corn was not delivered according to the bond, but was used by Howard. Dunn then recovered judgment on the delivery bond against the makers. An execution was issued on this judgment, levied upon the land of the appellee sold to Dunn, and a certificate of purchase issued to him by the sheriff.

Upon this statement of facts, the court found for the

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appellee, and, over a motion for a new trial and exception, rendered judgment on the finding.

This is right. The appellee was compelled by legal proceedings to so far discharge the original judgment in favor of Dunn and against Collins and Howard. His action, therefore, will lie for money paid to their use.

The judgment is affirmed, with costs and ten per cent. damages.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF KOKOMO
v. THE STATE, EX REL. ADAMS.

CITY.—Donation to Railroad.—Petition for.—Pleading.—Mandamus.—Power of Common Council.—Interest.—Statute Construed.—In an action by the State, on the relation of the president of a railroad company, against the mayor and common council of a city, for a mandate compelling the issue and delivery to such company of a certain amount in bonds of such city, the complaint alleged, that a petition was presented to the defendants by a majority of the resident freeholders of such city, representing that such company had been organized for the purpose of constructing a railroad from a certain point to such city, and asking the common council "to make a donation to said company of" a sum specified, to aid "in the construction of the said railroad, to be paid in the bonds of said city, within such time, and at such rate of interest, as" the common council should "deem proper," etc.; that, upon the report of a committee of the common council, that a majority of such freeholders had signed the petition, but without adopting such report, a resolution was adopted by the common council, declaring that such donation should be made, and directing that an ordinance making the same should be prepared; that such ordinance had been defeated; and that such railroad had been completed. A copy of the petition, and also of the proceedings of the council, were made exhibits.

Held, on demurrer, that such copies constitute no part of the complaint, but, having been treated as part thereof by the court below, may be so treated by the Supreme Court, on appeal.

Held, also, that the complaint is sufficient as presenting *prima facie* ground for issuing the writ of mandate demanded.

Held, also, that, under section 60 of the act of March 14th, 1867, (1 R. S. 1876, p. 267,) authorizing the incorporation of cities, etc., a writ of mandate is the only proper remedy in such case.

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Held, also, that the petition sufficiently describes the point to which the road was to be completed.

Held, also, no terms upon which such bonds should issue, and no rate of interest thereon, having been specified in the petition, it may be construed as asking the issue of a single bond for the whole amount, without interest, the council having no power to fix a rate of interest.

SAME.—*Interest of Councilman in Donation.*—*Defence.*—The fact, that at the time such petition was presented, and thence until the commencement of the action for a mandate, one of the members of the common council had been a stockholder, director and officer of such railroad company, did not disqualify him to act upon the petition, or the common council to pass an ordinance making the donation, and constitutes no defence to the action.

SAME.—*Estoppel.*—*Legality of Petition.*—The action of the common council, in adopting a resolution declaring that the donation petitioned for should be made, does not estop the defendants, in such action, from denying that such petition had been signed by a majority of the resident freeholders.

SAME.—*Pleading.*—An answer in such action, alleging that such petition had not been signed by a majority of the resident freeholders of the city, is sufficient on demurrer.

SAME.—*Statute Construed.*—*City of Kokomo.*—*Curative Act.*—The act of March 8th, 1875, (Acts 1875, Reg. Sess., p. 92,) legalizing certain acts of the common council of the city of Kokomo, does not apply in this action.

SAME.—*Consideration for Donation.*—Where, in such action, the petition for the donation shows that the railroad is not yet completed, and the donation is asked because the construction of such railroad will enhance the value of the property of the petitioners, an answer alleging a want of consideration for such donation is insufficient.

SAME.—*Fraud in Procuring Signatures.*—*Remonstrance.*—*Signing in Blank.*—*Principal and Agent.*—The defendant in such action answered, that the signatures to such petition had been procured by fraud, in that the petition had been signed in blank as to the amount to be donated, upon the representation of the person circulating the petition for signatures, that the blank would be filled by inserting an amount much less than had been afterward actually inserted.

Held, on demurrer, that the answer is insufficient.

Held, also, that such objection should have been presented to the common council by remonstrance.

Held, also, there being no averment in the answer that such representation had been relied on, that petitioners, by so signing in blank, conferred upon the person to whom the petition was by them entrusted an implied authority to fill such blank.

Held, also, that, under such petition the city would be entitled to receive no stock in such company, and therefore that false representations as to the amount of stock to be received by the city were immaterial.

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From the Howard Circuit Court.

J. O'Brien and *J. W. Kern*, for appellant.

N. R. Lindsay, *M. Bell* and *M. McDowell*, for appellee.

PERKINS, C. J.—A petition, in words and figures following, was presented to the common council of the city of Kokomo, on the 31st of October, 1873.

The petition to the council in this case is in the following words:

“To the Honorable Mayor and Common Council of the City of Kokomo:

“The undersigned petitioners, being a majority of the resident freeholders of the city of Kokomo, in the county of Howard, in the State of Indiana, represent to your honorable body, that the Frankfort and Kokomo Railroad Company is a duly organized company, incorporated under and pursuant to the laws of Indiana, for the purpose of constructing, owning and operating a railroad from the town of Frankfort, in the county of Clinton, in the State of Indiana, to the city of Kokomo aforesaid, and believing that said railroad, when completed, will greatly enhance the value of the property of this city and promote the general interest of the citizens thereof: We respectfully ask your honorable body to make a donation to said company of \$8,000, to aid the same in the construction of the said railroad, to be paid in the bonds of said city, within such a time, and at such a rate of interest, as you may deem proper, in accordance with the provisions and requirements of the 60th section of ‘An act,’ etc., approved March 14th, 1867, and the provisions of an act entitled ‘An act to enable cities to aid in the construction of railroads, hydraulic companies and water-powers, and declaring an emergency,’ approved May the 4th, 1869.”

The petition was presented under the following statutory provisions:

“SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That any city, incorporated under the

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general law of this State, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to the stock of any railroad, hydraulic company, or water-power, running into or through such city, or near the corporate limits of said city, or to make, on petition of the majority of the resident freeholders of such city, donations in money or the bonds of such city, to aid in the construction of any such railroad, hydraulic companies, or water-power; subject, however, to the limitations, direction and restriction named in the provisos to the sixtieth section of the act entitled, 'An act to repeal all general laws now in force for the incorporation of cities, prescribing their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto,' approved March 14th, 1867."

This act was approved May 4th, 1869. 1 R. S. 1876, p. 299.

The 60th section (1 R. S. 1876, p. 298,) of the act of 1867 referred to is this:

"Sec. 60. Any incorporated city under this act shall have power to borrow money, to subscribe to the stock of any plank road, macadamized road, or railroad, running into or through such city, * * * to make donations in money or bonds of such city, to aid in construction of such roads * * * , only on petition of a majority of the resident freeholders thereof: *Provided*, That said donations shall not be payable either in money or bonds, until the roads * * * , in aid of which it is given, shall be so far completed as to admit the running of trains from the point of commencement to such point or points as are designated in the petition, in case of a railroad, * * * ; and when so far completed, it shall be obligatory on the common council of said city to contract and do whatever may be necessary, to carry into effect the substantial meaning of such petition, and the obligation herein enjoined may be enforced in the courts of this State

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having competent jurisdiction, on the application of any signer of such petition, or president of any road * in behalf of which such donation may have been made, at any time after said petition or petitions have been presented to such common council, and for any debt created in pursuance of the provisions of this section in carrying out the intentions of the petitioners aforesaid, the common council shall add to [the tax] duplicate of such years thereafter, a levy sufficient to pay the annual interest on such debt or loan with an addition of not less than five cents on the one hundred dollars to create a sinking-fund for the liquidation of the principal thereof, which fund with all the increase thereof, shall be applied to the payment of such debt and to no other purpose."

On the 14th day of December, 1874, the complaint in this cause was filed in the name of the State, on the relation of Coe Adams, president of the Frankfort and Kokomo Railroad Company, alleging the corporate existence of the company; that the line of its road extended from Frankfort, in Clinton county, to Kokomo, in Howard county, Indiana; that it was completed; that a majority of the resident freeholders of the city of Kokomo had signed the petition above copied, in reliance upon which being granted by the city council, the road had been completed; averring a demand for the bonds, and praying a mandate to the city council to issue them, etc.

A copy of the petition was made a part of the complaint. Accompanying the complaint, as an exhibit, was a transcript of the proceedings of the city council had in relation to the matter of the donation petitioned for.

The making of these proceedings an exhibit in the complaint, and filing them with it, did not make them a part of it. *Knight v. The Flatrock, etc., Turnpike Co.*, 45 Ind. 134. But they were treated as being so below, and may, for the purposes of this case, be treated in the same way here. A paragraph of answer was held bad, on demurrer, as contradicting the record of the city council as

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to the passage of a resolution, thus assuming it to be a part of the complaint.

This question of contradiction will be presented before the final disposition of this cause, either by a reply to the answer or upon objections to evidence on the trial; hence, it may as well be settled now.

The record of the proceedings of the city council shows, that, the petition having been presented, a committee was appointed to examine it; that on the 3d of November, being three days after the petition was presented, a remonstrance was presented; that, on the 5th of November, the committee reported that a majority of the freeholders of the city had signed the petition; that, on the 5th of November, a resolution was adopted, declaring that the city would donate eight thousand dollars to the road, and directing the city attorney to prepare an ordinance making the appropriation. This resolution was adopted by four votes, there being two votes against it, and two members of the council not in attendance at the meeting; so that the resolution was passed by the votes of just one-half of the members of the council. The resolution was introduced and voted for by John M. Leach, who was at the time a stockholder in, and one of the directors and the treasurer of, the railroad company.

The record of the council further shows, that on the 14th of November, nine days subsequent to the adoption of the above-mentioned resolution, an ordinance, providing for a donation of eight thousand dollars, was introduced and read a third time, whereupon Mr. Leach moved that the rules be suspended and the ordinance read a second time, which motion was lost, receiving but four votes in its favor. The ordinance never was adopted.

The complaint was in two paragraphs.

Demurrer to the complaint, assigning two causes:

1. Want of sufficient facts; and,
2. Want of capacity in the plaintiff to sue the defendant.

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The demurrer was overruled, and exception taken.

The return to the alternative writ and answer to the complaint are in five paragraphs :

The first paragraph alleges, that John M. Leach was, at the time of the signing of the petition referred to in the complaint, and at the time of the presentation of the same to the city council of the city of Kokomo, and at the time of the demand upon the city for the issuance of bonds for eight thousand dollars, as a donation, in pursuance of the petition of citizens, and up to and at the time of bringing the suit, a member of the city council of the city of Kokomo, Indiana, and at the same time a member of the Frankfort & Kokomo Railroad Company, and the owner of one hundred and five shares of her capital stock, and the treasurer of the Frankfort & Kokomo Railroad Company, duly elected by her board of directors, and was one of the directors of the company; and that, because said Leach was such member of the common council, also of the railroad company, the defendants were, at all times from the date of presenting the petition to the common council of Kokomo until the date of the commencement of suit against the defendants, wholly unable to pass a valid ordinance, and issue bonds as prayed for in the complaint.

The second paragraph alleges, that there never was a majority of the resident freeholders' names attached to the petition, and gives the number of freeholders residing in the city, the number of names attached to the petition, the number that were not residents of the city, the number whose names were attached who were not at the time freeholders, and the number whose names were attached without their authority, and the number who had, after signing said petition, withdrawn their names by signing a remonstrance to it, leaving but two hundred and one persons who were legal signers to said petition; while the whole number of freeholders residing

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in the city was five hundred and thirty-eight, more than twice the number of legal signers.

The third paragraph alleges, that, at the date and time of signing and presenting the petition described in the complaint, there was no legal incorporation of the city of Kokomo, and that there was no valid, legal incorporation until March 5th, 1875.

The fourth paragraph alleges, that, at the time of the signing of the petition and the presentation thereof to the city council, the Frankfort & Kokomo Railroad Company was already incorporated, and the road in process of construction, and that there was no consideration whatever for the proposition to donate eight thousand dollars, contained in the petition of citizens.

The fifth paragraph alleges, that there were fraudulent representations and practices on the part of the officers and employees of the plaintiff's relator, the railroad company, in procuring the signatures of citizens to the petitions for a donation of eight thousand dollars by the city, and avers and charges the facts constituting the fraudulent representations complained of.

There was a demurrer to each paragraph of the answer, as follows:

To the first, because it did not contain facts sufficient to constitute a defence.

To the second, there were two causes of demurrer: 1st. Want of jurisdiction to hear and determine the matters therein alleged; 2d. Want of sufficient facts.

To the third, fourth and fifth paragraphs, that they did not contain sufficient facts.

Demurrers sustained, and exceptions taken.

The defendant elected to stand upon her answer; whereupon the court awarded a mandate, commanding the city council to pass an ordinance for the issue of bonds to the amount, in the aggregate, of eight thousand dollars, to which award of mandate the defendant excepted, etc.

Appeal to the Supreme Court.

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The first question arising is, did the complaint make a case for a mandate, upon the application of the railroad company?

Without the aid of a statute, the company could not maintain this suit for a mandate, according to the case of *Sankey v. The Terre Haute, etc., R. R. Co.*, 42 Ind. 402, and authorities there cited. But section 60 of the act of 1867, hereinbefore copied, declares, that "it shall be obligatory on the common council of said city to contract and do whatever may be necessary, to carry into effect the substantial meaning of such petition, and the obligation herein enjoined may be enforced in the courts of this State having competent jurisdiction, on the application of any signer of such petition, or president of any road * in behalf of which such donation may have been made."

How enforced, we may next enquire. The act required to be performed by the city council is, to contract with the railroad company by issuing a bond or bonds to it, in compliance with the petition of a majority of the freeholders, etc. That act, upon a proper petition, it is the absolute duty of the council to perform. Where the performance of such an act becomes the absolute duty of a corporation, mandate is the proper, indeed the only, remedy. Section 739, p. 296, 2 R. S. 1876, is as follows:

"Writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins; or, a duty resulting from an office, trust or station."

Does the complaint in this suit allege the existence of a state of facts, upon which the law made it the duty of the city council of Kokomo to issue a donation bond or bonds to the Frankfort and Kokomo Railroad Company? The facts upon which, by law, that duty would arise, are a petition to the council, signed by a majority of the resident freeholders of the city, specifying the road to which the donation asked was to be made, the amount of the

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donation, and the point to which the road must be completed before the donation bonds might be delivered by the city.

The petition in this case fills the measure of the statute, and is free from extraneous, irrelevant matters.

It is suggested that it does not name a point to which the road must be completed before the bonds may be delivered; but we think it does; that it names the end, the final terminus of the road as the point.

It is objected that the petition does not name a rate of interest. This objection is true in fact. It does not, but refers that subject to the council. When we consider that the interest upon a bond is a part of the burden it lays upon the people, and that the council has not the power, in its discretion, to impose such burdens, but only upon the petition of the freeholders, we think we should construe the petition in this case as one asking a donation of eight thousand dollars, in amount, without interest. This construction removes from the petition, also, a feature which, it is claimed, submits to the discretion of the council an item in the terms in which the bonds may issue, and thus makes the case one in which there is not such an absolute duty to be performed as can be coerced by mandate. We think the issue of one bond, in this case, to the proper corporation, in the sum of eight thousand dollars, bearing no rate of interest, would be such a compliance with the petition and statutes as would preclude interference on the part of the courts, by way of mandate or otherwise. At the same time, if the council saw fit to issue the bond or bonds, bearing some rate of interest, without delay, we do not decide that the act would be illegal, in view of the petition; but the absolute legal obligation is to issue eight thousand dollars, in amount, of bonds. See *State v. The Board, etc.*, 45 Ind. 501. We think the complaint was based upon what appeared on its face, and was alleged in the complaint, to be

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a sufficient petition; that it made a *prima facie* case under the statutes, in which it was the duty of the city council to make the donation petitioned for, and was the right and duty of the court to issue a mandate, commanding the council to issue the donation bond or bonds.

We turn to the answer. The first paragraph of it, alleging the relation of John M. Leach, a member of the city council, to the railroad company, in the opinion of the court, is insufficient. The petition of a majority of the freeholders of the city would establish the right of the railroad company to the donation. It was the duty of the city council to officially ascertain and declare, whether such a petition was presented to it, before it proceeded to issue bonds for the donation. Till such a petition was presented, the council had no power to issue such bonds; and, when such a petition was presented, the council had no right to refuse to issue them on the completion of the road to the designated point; a fact, also, to be ascertained by the council.

"And when so far completed," says the statute, "it shall be obligatory on the common council," etc., "and the obligation herein enjoined may be enforced in the courts," etc.

Under the statute, donation bonds are not issued or withheld in the discretion or upon the judgment of the council. They are issued, as has been said already, in compliance with the properly framed written request of a majority of the freeholders of the city. When such request is presented, it is the duty of the council to comply with it by issuing bonds. Till such request is presented, the council has no power to issue a bond.

Such being the case, we think the facts alleged in the first paragraph of the answer were not such as created a disqualification of Leach to act as councilman, in the matter of the donation.

We proceed to the second paragraph of answer. It avers that the petition to the council to make a donation

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was not signed by a majority of the resident freeholders of the city; that there was at that date a certain number of resident freeholders in the city, giving the number, that a certain number signed the petition, stating the number, thus showing that a majority did not sign. We think the court erred in sustaining the demurrer to this paragraph of answer. This ruling is defended upon the grounds, that the answer contradicts the record of the city council, and that the council is estopped to deny that the petition was sufficiently signed.

If the city had issued the bonds, and especially if they had passed into the hands of a *bona fide* holder, and this was a suit on such bonds, a different question from that now before us might be presented. Here, it will be remembered, the city has not issued the bonds, and this is a suit to compel their issue; and the city council answered, as a justification of her refusal, that the condition has not been performed, the performance of which alone gives her the power to issue them, viz., the signing of a petition therefor by a majority of the resident freeholders. This answer denies a material fact, that must be found to exist before the power to issue the bonds vests in the council. See *Rhodes v. Piper*, 40 Ind. 369, and *Knight v. The Flat-rock, etc., Turnpike Co.*, 45 Ind. 134. It is urged that the council has decided that the fact exists. The record of the council does not show such a decision. See *Noble v. The City of Vincennes*, 42 Ind. 125. It shows that a committee of the council had reported that the fact existed, but it fails to show that that report had been adopted, concurred in, confirmed, or in any manner acted upon by the council. It is claimed, however, that as the council adopted a resolution that it would make the donation, and directed the city attorney to draft an ordinance, etc., the conclusive presumption arises, that the council had concurred in the report of the committee. If, as we have said, this were a suit by a *bona fide* holder of an issued bond, such presumption might arise; but, in this suit to

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compel the issue of the bonds, we think the presumption that arises as to concurrence in the report of the committee is no stronger, at all events, than a *prima facie* one, and such a presumption does not preclude a denial of the fact by plea or answer. Such presumption may be rebutted. See *Langsdale v. Bonton*, 12 Ind. 467.

Nor is there any estoppel in this case. An estoppel could only arise in favor of a party who had *bona fide* acted upon the fact of the passage of the resolution of the council. The railroad company in this case is not such a party. If it derived its knowledge of the passage of the resolution from the record, that would disclose to it, at the same time, that the council had failed, so far as appeared, before passing it, to determine the number of the petitioners. This would have put the company on inquiry. Further, nine days after the passage of the resolution, the council refused to pass the ordinance directed in the resolution to be prepared, of which refusal the railroad company had notice, her treasurer and one of her directors, Mr. Leach, being present, and participating in it when this action of the council occurred. The railroad could scarcely have involved itself much upon the faith of the resolution mentioned.

It is further claimed that all the acts of the council in the premises are validated by the curative act of March 8th, 1875. Acts 1875, Reg. Sess., p. 92. That act declares that all official acts of the common council of Kokomo, done under ordinances and resolutions, are thereby legalized.

This statute has no application to the case before us. And it is proper that it should be remembered here, that the statute authorizing the city council to vote away the property of the citizens should be construed with reasonable strictness, and its provisions should be strictly complied with. All the guards it furnishes for the security of the citizen against hasty and injudicious action should be faithfully maintained.

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The third paragraph of answer is abandoned by counsel for appellant in their brief.

The fourth paragraph, alleging want of consideration, is shown by the record to be false in fact; at the time of the petition, the road was not completed. Means and credit were needed to enable the company to complete it. The consideration for the donation is stated in the petition to be the enhancement of the value of the property, and the promotion of the general interest of the citizens by the completion of the road.

The fifth alleges the use of means claimed to be fraudulent, in obtaining signatures to the petition, viz.: that the petition was signed in blank, as to the amount, and afterward filled up with an amount different from that stated by the canvasser for signatures to those signing it as the sum to be asked for; and that false representations were made as to the amount of the stock subscribed to the company; but it is not alleged in the answer, that the signers relied upon these representations, and it does not appear in this paragraph of answer, that they are now objecting on this ground, or any other. They might have objected at the proper time by remonstrance. *Noble v. The City of Vincennes*, 42 Ind. 125. And it is averred in the second paragraph of answer, that objection was thus made in this case.

As to signing articles in blank, the law as to contracts is said by Parsons to be this: "If one signs his name to a bill or note, leaving a blank for the sum, and intrusts it to another, this is *prima facie* evidence of authority; in England, to insert any sum that the stamp will cover, and for any purpose; and in this country, to insert an indefinite sum." 1 Parsons Notes & Bills, 109.

If this would be the law as to the signing of such petitions as that in this case, then, as the paragraph of answer does not aver that the signers relied at all upon the representations, the petition, as to its validity in this respect, will be governed by the general rule of law above

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stated But this point is not necessarily important, as the paragraph of answer may be amended before another trial.

And as to the amount of stock taken in the corporation, the donation was not to be made upon this, but on and for the completion of the road. The city was not to receive any stock; she was to receive no dividends. The petitioners wanted the road for the general public good, and were asking the city to make the donation on account thereof.

We think the fifth paragraph of answer insufficient.

But, for the error in sustaining the demurrer to the second paragraph of answer, the judgment must be reversed.

The judgment is reversed with costs, and the cause remanded for further proceedings, in accordance with this opinion.

 MCCARNAN ET AL. v. COCHRAN.

REAL ESTATE.—Action to Recover.—Pleading.—Disclaimer.—Judgment.—

Costs.—Where, in an action for the recovery of real estate, the defendant appears and answers, disclaiming all interest in, or title to, the premises in controversy, and alleging the possession thereof to be in a third person, not a party to the action, such answer amounts to a disclaimer, entitling the defendant to a judgment for costs.

SAME.—Making New Parties.—Amendment.—Upon the filing of such disclaimer, the plaintiff in such action filed an "additional paragraph of complaint," against such third person, asking that he be made a party "to answer as to" his "interest in and to the land mentioned in the complaint against" the original defendant, "and to show cause," if any he has, "why plaintiff should not have judgment for possession of the land," etc., and for "damages for being kept out of possession," etc.

Held, on demurrer, that such paragraph of complaint, considered either independently or as an amendment to the original complaint, which was in the ordinary form, is insufficient.

57	166
142	219

57	166
148	576

Held, also, that each paragraph of a pleading must be complete within itself, and that defects therein can not be aided by reference to another paragraph.

From the Jennings Circuit Court.

J. Overmyer and *D. Overmyer*, for appellants.

G. W. Swarthout, for appellee.

Howk, J.—The appellee, as plaintiff, commenced an action in the court below against the appellant John McCarnan, as sole defendant, for the recovery of the possession of certain real estate in Jennings county.

The appellee's complaint was in the ordinary form in such cases.

To this complaint, the appellant John McCarnan, then sole defendant, answered, in substance, that on the 10th day of February, 1864, one Henry Morehow received from the auditor of said county a "tax deed" of said real estate; that said Morehow at once took full possession of said real estate, and so remained in possession until his death, in the year 1869; that, since the death of said Morehow, his widow and children had been in the full enjoyment and possession of said real estate, and still so remained; and that the appellant John McCarnan had no interest in, nor title to, said real estate.

In legal effect, this answer was merely a disclaimer by the appellant John McCarnan, and entitled him to a judgment for costs. 2 R. S. 1876, p. 254, sec. 613.

The cause was then continued, with leave to the appellee to amend his complaint, by making new parties defendants.

In vacation, the appellee filed the following "additional paragraph:—"

"Comes the plaintiff in the above entitled cause, and, for additional paragraph of complaint, shows this court, that Minnie Morehow, widow of Henry Morehow, deceased, as disclosed in defendant's answer to the original complaint as owner of the land described therein, Mary

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Morehow, now Mimie Mary Parker, whose husband is dead, and Minnie Euler, daughter of said Henry, who has intermarried with George Euler, heirs at law of said Henry Morehow, deceased, are hereby made parties to answer as to their interest in and to the land mentioned in the complaint against John McCarnan, filed and answered to at the last term of this court, and to show cause, if any they have, why plaintiff should not have judgment for possession of the land in his complaint mentioned, also for damages for being kept out of possession, and all things relating thereto."

To this additional paragraph, the appellants, except said McCarnan, being the heirs at law of Henry Morehow, deceased, named in said paragraph, demurred for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled by the court below, and the appellants, except said McCarnan, excepted to said decision. The appellants, except said McCarnan, answered the appellee's complaint by a general denial and three special defences. No question is presented for our consideration upon any of these defences, except the third in number. In this third paragraph of answer, the appellants, except said McCarnan, alleged, in substance, that the real estate in appellee's complaint mentioned was sold for taxes by the treasurer of said Jennings county to one Henry Morehow, who received a certificate of sale therefor from the auditor of said county, under and through whom the said appellants claimed and derived title, on the 3d day of February, 1862, and that afterward, on the 8th day of February, 1864, said Henry Morehow obtained a deed for said real estate from the said auditor, and that this suit was not instituted until the — day of —, 1874; wherefore the said appellants alleged, that this action was not commenced within five years from the date of said sale, and they asked that this action abate, and that they have judgment for costs and other proper relief.

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The appellee demurred to this paragraph of answer, for the want of sufficient facts therein to constitute a defence to his action, which demurrer was sustained by the court below, and to this decision said appellants excepted. The action, having been put at issue, was submitted to the court for trial, which resulted in a finding and judgment in favor of the appellee, for the recovery of said real estate, from which judgment this appeal is prosecuted.

The appellants have assigned, in this court, the following alleged errors of the court below :

1st. In overruling the demurrer of the appellants, except said McCarnan, to the additional paragraph of appellee's complaint; and,

2d. In sustaining the appellee's demurrer to the third paragraph of the answer of the appellants, except said McCarnan.

It can not be doubted, we think, that the facts stated in the "additional paragraph" of appellee's complaint were clearly insufficient to constitute a cause of action against the appellants, the heirs at law of Henry Morehow, deceased. As against these appellants, this "additional paragraph" is the only complaint in the record, and it does not contain a statement of any one of the matters required by statute in such a complaint. The 595th section of our practice act provides, with precision, what shall be stated in such a complaint, as follows :

"Sec. 595. The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession." 2 R. S. 1876, p. 251.

In this "additional paragraph" of his complaint, the appellee has not stated that he was entitled to the possession of the real estate, nor has he particularly described said real estate, nor has he stated the interest he claimed therein, nor did he allege that the defendants unlawfully kept him out of possession thereof. It is well

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settled by numerous decisions of this court, that each paragraph of a pleading must be perfect and complete within itself, and that defective allegations in one paragraph can not be aided by reference to another paragraph. *Silvers v. The Junction Railroad Co.*, 43 Ind. 435; *Potter v. Earnest*, 45 Ind. 416; *Clarke v. Featherston*, 32 Ind. 142.

In the case at bar, if the appellee had not denominated his pleading as an "additional paragraph," we should have considered it as merely an amendment of the original complaint, and intended to be a part thereof. But even if thus considered, the facts stated therein would not have been sufficient to constitute a cause of action against the appellants, the heirs of Henry Morehow, deceased; because even then the complaint would not have contained an averment that these appellants had unlawfully kept the appellee out of the possession of the real estate. Our conclusion therefore is, that the court below erred, in overruling the demurrer of the appellants, except said McCarnan, to the "additional paragraph" of appellee's complaint.

As this conclusion will make it necessary for the appellee to amend his complaint, which may lead to the formation of other and different issues, we need not now consider and decide the questions presented by the second alleged error.

The judgment of the court below is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the demurrer of the appellants, except said McCarnan, to the additional paragraph of appellee's complaint, and for further proceedings.

HORNING ET AL. v. WENDELL.

LIQUOR LAW.—*Act of 1873.*—*Section 12.*—*Constitutional Law.*—Section 12 of the act of February 27th, 1873, (Acts 1873, p. 151,) regulating the sale of intoxicating liquors, etc., in so far as it gave a right of action to any one injured in person or property by an intoxicated person, against the person causing the intoxication, was constitutional.

SAME.—*License.*—A person licensed under the provisions of such act took his license subject to all the restrictions and burdens imposed by such section.

BILL OF EXCEPTIONS.—*Practice.*—*Supreme Court.*—A bill of exceptions filed after the expiration of the time granted therefor forms no part of the record on appeal to the Supreme Court.

From the Jefferson Circuit Court.

J. R. Cravens and *E. G. Leland*, for appellants.

WORDEN, J.—This was an action by the appellee, Elizabeth Wendell, against the appellants, under the 12th section of the liquor law of 1873. Acts 1873, p. 151.

The substance of the case made by the complaint was, that the defendants, by selling intoxicating liquor to one Isaac Richardson, caused his intoxication, and that the latter, while thus intoxicated, injured the plaintiff in her person and property, setting out the injury.

Demurrer to the complaint for want of sufficient facts overruled, and exception. Trial by jury, verdict and judgment for the plaintiff, over a motion for a new trial.

The appellant insists that the section of the statute on which the action is based is invalid, and urges several reasons therefor which need not be noticed in detail. We are not aware of any provision in either the federal or state constitution that is violated by the section in question, at least so far as it gives the right of action in such case as that presented.

It was said by this court, in the case of *Churchman v. Martin*, 54 Ind. 380-383: "When, therefore, an act of the General Assembly is passed, which violates no provision of the federal or state constitution, the judicial depart-

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ment can not hold it to be void on the ground that it is wrong, or unjust, or violates the spirit of our institutions, or impairs natural rights." The validity of the section, in respect to the matter embraced in this action, has been, in several instances, recognized by this court. *Barnaby v. Wood*, 50 Ind. 405; *English v. Beard*, 51 Ind. 489; *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Koerner v. Oberly*, 56 Ind. 284.

It is argued, that, as the permit provided for by the act vests the person holding it with the right to sell intoxicating liquors, and as section 12 impairs this right and so interferes with it as to limit its enjoyment, it can not be enforced. But it must be remembered, that a person who took a permit under the law took it clogged with whatever burdens or responsibilities were imposed by the law. *Black v. Merrill*, 51 Ind. 32.

We are of opinion that no error was committed in overruling the demurrer to the complaint.

No question is before us, arising on the motion for a new trial. The court, on the 16th day of May, 1874, overruled the motion for a new trial, and gave sixty days in which to file a bill of exceptions, but the bill was not filed until the 18th day of July, 1874. This was too late.

The judgment below is affirmed, with costs.

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135 486
136 618

 WILKERSON ET AL. v. RUST.

PLEADING.—*Practice.*—*Demurrer for Misjoinder of Causes of Action.*—*Supreme Court.*—No judgment can be reversed for error committed in either sustaining or overruling a demurrer for misjoinder of causes of action.

SAME.—*Action Against Several Parties.*—*Sufficient as to One.*—*Joint Demurrer by All.*—If a complaint against two or more defendants state facts constituting a good cause of action against any one of them, a joint demurrer by all, for want of sufficient facts, should be overruled.

Wilkerson et al. v. Rust.

SAME.—Erroneous Judgment.—How Objected to.—Where, by the complaint, the plaintiff is entitled to some kind of relief or judgment against a defendant, but the court renders a judgment different from, or beyond, that authorized by the complaint, the defendant may avail himself of the error, by objecting and excepting to the judgment as rendered.

MECHANICS' LIENS.—Repairs.—New Building.—Action to Enforce.—Contract.—Mechanic Employed by Tenant.—Liability of Landlord.—Notice of Lien.—

In an action by a mechanic, against the owner of certain separate tracts of real estate and his tenant, to recover for the value of labor performed by the plaintiff, in repairing one, and in erecting another, building on such realty, and to enforce a mechanic's lien, the complaint alleged that the defendants were "indebted to him" for the value of such labor; that it had been performed at the request of the tenant; that the landlord "was aware of and consented to" the making of such improvements; that the same were made while the premises were occupied, "free of rent," by the tenant, who was then and there engaged in his individual business; that the tenant, "with the knowledge, consent and assistance of" the landlord, was making improvements on such premises; that plaintiff's labor had been performed as a necessary part thereof; and that the plaintiff had filed for record a notice of his intention to hold a lien on the whole of such realty, for the entire value of such labor.

Held, on joint demurrer, that though the cause of action stated in the complaint is only sufficient to authorize a personal judgment against the tenant, the demurrer should be overruled.

Held, also, on separate demurrer by the owner, that, on the facts stated in the complaint, he is not personally liable.

Held, also, that, on the facts stated, a mechanic's lien against such realty can not be enforced.

Held, also, that the notice of such intended lien is insufficient.

Held, also, that, by section 648, (2 R. S. 1876, p. 267,) concerning mechanics' liens, a mechanic's lien can not be acquired, as against the owner of real estate, for repairs made by the mechanic, on a contract with the tenant.

Held, also, that a lien for the total value of such repairs and the labor on such new building can not be enforced against such buildings, either separately or jointly.

WITNESSES.—Impeachment of.—Statements out of Court.—Evidence.—On the trial of an action to recover for services alleged to have been performed by the plaintiff, for and at the request of the defendant, where the defence is, that such services had been performed for, and on the credit of, the defendant's contractor, to which the latter has testified on behalf of the defendant, the plaintiff may then, after laying the proper ground, impeach such witness, by giving evidence of statements made by him, that the plaintiff had been hired by, and on the credit of, the defendant.

From the Jennings Circuit Court.

Wilkerson *et al.* v. Rust.

A. G. Smith, for appellants.

D. Overmyer, for appellee.

WORDEN, J.—Complaint by the appellee against the appellants, as follows:

“George S. Rust complains of John C. Wilkerson and Thomas Wilkerson, and says, that said defendants are indebted to him in the sum of two hundred and fifty dollars, in manner and form as follows, to wit: that said defendant John C. Wilkerson engaged and employed this plaintiff on the — day of —, 1874, to do a certain job of plastering for him, upon a certain building, situate on lots numbered two hundred and thirty, two hundred and thirty-one and two hundred thirty-two, in block T, in the town of North Vernon, in said county; that plaintiff did said work, under the direction of said Wilkerson, who assumed control and ownership of said real estate; and the plaintiff designates the particulars of his work, as follows:” (here follow the particulars of the work.)

“And plaintiff further avers, that said Thomas Wilkerson, defendant, was, at the time of said work, and is now, the owner of said real estate, and that he was aware of, and consented to, said improvements then and there being made; and that said defendant John C. Wilkerson, who is a son of said defendant Thomas Wilkerson, was, at the time, in the possession of said real estate, carrying on business thereon in his own name and person, and with the consent, knowledge and assistance of his said father, Thomas Wilkerson, was then and there having extensive improvements made upon said real estate, in the way of repairing the building and putting up new and additional apartments and rooms, and buildings; and plaintiff’s work was done, as aforesaid, as a necessary part of said improvements, and these improvements were being made for the accommodation of said John C. Wilkerson, who was then enjoying, and expected to enjoy, the use and occupation of said real estate, free of rent, and do business therein in his own name, and enjoy for himself the

added reputation which the establishment would have by reason of said improvements; and plaintiff says, that on the 31st day of July, 1875, he caused to be recorded in the recorder's office of said Jennings county, a certain notice, in the words and figures following, to wit:" (here follows a notice of mechanic's lien, not necessary to be here copied.) "And the plaintiff says, that he caused said notice to be recorded as aforesaid within sixty days of the time of the completion of his said work; that said sum remains due and unpaid. Wherefore," etc.

Judgment is demanded for the sum claimed to be due, and for the foreclosure of the lien.

The defendants filed a joint demurrer to the complaint, assigning for cause that it did not state facts sufficient, and that several causes of action had been improperly united. The defendant Thomas Wilkerson also filed his separate demurrer, assigning the same causes. These demurrers were respectively overruled, and the defendants excepted.

The defendants answered, and issues were formed, and the cause was tried by a jury, resulting in a verdict for the plaintiff in the sum of eighty-two dollars and seventy cents, and in his favor as to the mechanic's lien.

A motion for a new trial having been overruled, the plaintiff waived the foreclosure of the mechanic's lien, and took a joint personal judgment against the defendants for the amount found due.

The errors assigned bring in review the rulings on the demurrers, and in overruling the motion for a new trial.

No judgment can be reversed for an error committed in either sustaining or overruling a demurrer for misjoinder of causes of action. 2 R. S. 1876, p. 59, sec. 52. We therefore need only consider the other cause of demurrer, the want of sufficient facts. And we may further observe, that, if facts were stated sufficient to constitute a cause of action against either of the defendants, the joint demurrer was properly overruled.

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The complaint, as against John C. Wilkerson, it seems to us, was clearly good. It alleges that John C. was indebted to the plaintiff for the plastering, the particulars of which are specified; that John C. engaged and employed the plaintiff to do the work, which was done under his direction, and that the sum demanded remained due and unpaid. There was clearly a good cause of action stated against John C., on which a personal judgment could be rendered against him; and, therefore, the joint demurrer was correctly overruled, whether on the facts stated the plaintiff was entitled to a lien or not.

Objection is made to the sufficiency of the notice of intention to hold the lien, but we need not now consider that objection, inasmuch as there was a good cause of action stated against John C., though there may not have been sufficient stated to give the plaintiff a lien. The court committed no error in overruling the joint demurrer for want of sufficient facts.

We come to the separate demurrer of Thomas Wilkerson. And it may be observed, that, if facts enough are alleged to show that Thomas was jointly indebted to the plaintiff for the work, or if, on the facts, the plaintiff was entitled to a lien on the property as against said Thomas, he was a proper party to the action, which sought the enforcement of the supposed lien as well as a personal judgment, and his demurrer was correctly overruled. There was in the case, as has been stated, a personal judgment against the defendant Thomas as well as John C.; but if the complaint did not state facts sufficient to authorize the personal judgment, conceding that it stated sufficient to establish the lien as against him, the demurrer was, nevertheless, correctly overruled. If a complaint state facts sufficient to constitute a cause of action against a party, and entitle the plaintiff to some kind of relief or judgment, and the court renders a judgment different from, or beyond, that authorized by the facts stated, the defend-

ant may avail himself of the error, by objecting and excepting to the judgment as rendered.

Upon an examination of the complaint, we do not find any facts therein stated which authorize a personal judgment against the defendant Thomas Wilkerson. The facts stated do not show that Thomas was jointly liable with John C. to the plaintiff for the work, nor, indeed, that he was liable at all. The complaint, to be sure, starts out by saying that the defendants are indebted to the plaintiff in the sum of, etc., in manner and form, as follows, etc., and then proceeds to state facts which show an indebtedness of John C., only, to the plaintiff. It is alleged that John C. engaged and employed the plaintiff to do the work, and that it was done under his direction, and that John C. assumed control and ownership of the property on which the work was done. It is further alleged that John C. was in possession of the property, and, in substance, that he made the improvements thereon, to do business thereon in his own name, expecting to enjoy the use and occupation thereof, free of rent, etc.

All of this repels the idea that the plaintiff's work was done for, or upon the credit of, Thomas Wilkerson. It is alleged that Thomas was the owner of the property, but that John C. was in possession of it, doing business in his own name, with the knowledge, consent and assistance of his father, Thomas, and that the latter was aware of, and consented to, the improvements. This, however, does not show that the work was done upon the credit of Thomas, or that the latter in any way bound himself to pay therefor.

It remains to enquire whether the complaint alleged facts sufficient to entitle the plaintiff to a lien on the lots, as against Thomas Wilkerson. The statute on the subject of mechanics' liens provides, that "The provisions of this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into

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with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, distillery or other manufactory, unless furnished to the owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest." 2 R. S. 1876, p. 267, sec. 648.

It is thus seen that a lien for repairs can not be acquired, as against the owner of the property, except upon a contract made with him; and not upon any contract made with the tenant, except only to the extent of his interest. See *Lynam v. King*, 9 Ind. 3; *Baylies v. Sinex*, 21 Ind. 45.

It appears from the complaint, that Thomas Wilkerson was the owner of the property, and it does not appear that any contract, express or implied, existed between him and the plaintiff for the doing of the work. Hence, the plaintiff acquired no lien upon the property, as against Thomas Wilkerson, the owner, unless the work was done upon a new building, even if it could have been acquired had the work been done upon a new building.

The notice set out in the complaint states, that the plaintiff intends to hold a lien upon the lots, describing them, "said lien being to secure the sum of one hundred and ninety-five dollars, which is a balance due me for work and labor performed in the repair of a certain brick building thereon situate, and in the erection of new and additional buildings thereon, upon all of which I hold a lien, as aforesaid, said work and labor being done at the instance and request of one John C. Wilkerson."

It is plain, that, on the facts stated, the plaintiff acquired no lien on the property, as against Thomas Wilkerson, the owner, for the repairs; and assuming, though not deciding, that he might have acquired a lien upon it, as against the owner, for the work done on the new buildings, on the facts stated, the question arises whether the notice was sufficient for that purpose. What was the amount of the plaintiff's claim for the work done on the new buildings? The notice does not answer this question.

The notice was, that the plaintiff intended to hold a lien on the whole property for the entire sum claimed to be due, including that for repairs as well as that for work on the new buildings, without any designation as to the amount claimed by him for work on the new buildings. It was no more effectual for acquiring a lien for the work done on the new buildings than if no amount whatever had been stated. The statute was not complied with, which requires that the notice shall specifically set forth the amount claimed. 2 R. S. 1876, p. 268, sec. 650.

The notice was also radically defective in another particular. There were three lots described on which a lien was sought to be acquired. A part of the work was done in the repair of a certain brick building, situate somewhere on the lots, and a part was done upon new buildings, but it was not stated or shown on what part of the lot or lots either the old or the new buildings were situated. It is clear that the plaintiff could acquire no lien on the old building or the lot or part of a lot on which it was situated, for the work done on the new buildings; nor could he acquire a lien on the new buildings or the lot or part of a lot on which they were situated, for work done in the repair of the old building. *Hill v. Braden*, 54 Ind. 72. It is apparent, from the notice itself, that the plaintiff could not acquire a lien upon the whole of the lots for the work done on the new buildings, because it shows that a part of them at least was occupied by the old building. The notice was, therefore, radically defective, in not stating the part or parts of the lots on which the plaintiff sought to acquire a lien for the work on the new buildings. See the case last above cited.

We are of opinion, that, on the facts stated, the plaintiff acquired no lien on the property, as against the defendant Thomas Wilkerson, and that the court erred in overruling his demurrer to the complaint.

We have examined the grounds upon which a new trial was asked, and have concluded, that, so far as the defend-

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ant John C. Wilkerson is concerned, the court committed no error in overruling the motion. As there was only a personal judgment rendered against him, the record is disencumbered of any question as to a lien, so far as such question might affect him. There was evidence given designed to establish and locate the lien, which need not be here stated in detail, to which exception was taken. But we can not see how it prejudiced the defendant John C. Wilkerson upon the point of his personal liability.

On the trial, there was evidence tending to show that the defendant John C. employed the plaintiff to do the work; and, on the other hand, there was evidence tending to show that said defendant employed one Joseph Bundy to do the work, and that the plaintiff was a subcontractor under Bundy. On this point, there was a conflict in the evidence, but we can not disturb the conclusion arrived at by the jury.

One point made by the appellants we may notice specially. On the trial, the defendants introduced Joseph Bundy as a witness, whose evidence tended to establish the proposition that he took the job of work from the defendant John C., and that he, Bundy, employed the plaintiff, who was to look to Bundy for his pay. The plaintiff, upon the cross-examination, and with a view, as we suppose, to the impeachment of the witness, by showing statements made out of court, at variance with his evidence, asked him the following questions:

"Did you not say, at James Penniston's shop, in North Vernon, the latter part of March or first of April, to James Penniston, that you picked the man to do the plastering, and John" (meaning John C. Wilkerson) "did the hiring?"

"Answer. I did not.

"Did you not, at the same time and place, say to James Penniston, that you hired the man to do the plastering, and that John" (meaning John C. Wilkerson) "became paymaster?"

"Answer. I do not remember of making this statement."

The plaintiff then, at the proper time, called James Penniston as a witness, and the following questions were put and answers elicited :

"Did Joseph Bundy say to you, at your shop, in North Vernon, the latter part of March or first of April, that he picked the man to do the plastering, and John" (meaning John C. Wilkerson) "did the hiring?"

"Answer. He did."

"Did he, at the same time and place, say to you that he hired the man to do the work, and John" (meaning John C. Wilkerson) "had become paymaster?"

"Answer. He did."

The defendants objected to the evidence of Penniston, on the ground that it was immaterial, but it was admitted, and exception taken.

The counsel for the appellants argues that the evidence of Penniston was given to prove the fact that Wilkerson was to pay the plaintiff for his work. We think it plain, however, that the purpose of the evidence was to impeach the witness Bundy, and for this purpose it was competent.

The judgment below, as to John C. Wilkerson, is affirmed, and, as to Thomas Wilkerson, it is reversed, and the cause remanded, with instructions to the court below to sustain the demurrer of the latter to the complaint.

Costs in this court to be paid equally by the appellee and John C. Wilkerson.

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57 182
140 3

VAUGHN v. FERRALL.

PLEADING.—Practice.—A pleading, replied generally to the whole of an answer of several paragraphs, is not insufficient on demurrer merely because some of such paragraphs require, and admit of, no reply.

PROMISSORY NOTE.—Alteration.—Estoppel.—Pleading.—In an action by an assignee, on a promissory note payable in a bank of this State, where the defences pleaded by the defendant maker were want of consideration, and that, after the execution of the note and before its assignment, the payee thereof, with the knowledge of the plaintiff, but without the knowledge or consent of the defendant, had procured the execution of such note by a third person, the plaintiff replied, that, before procuring such assignment to himself, he had taken such note to the defendant, who, in answer to his enquiries concerning it, informed him that he had no defence thereto, and would pay it, and that, relying upon such statements, the plaintiff had procured an assignment of the note for value.

Held, on demurrer, that the reply is sufficient.

PRACTICE.—Demurrer.—Form of.—A demurrer to a reply consisting of several paragraphs, assigning that "neither of said paragraphs constitutes a good reply to said answer," is informal and defective, and should be overruled.

SUPREME COURT.—Record.—Evidence.—Verdict.—Practice.—Where the evidence is not in the record, on appeal to the Supreme Court, no question is presented for decision as to whether the verdict is contrary to law or to the evidence.

NEW TRIAL.—Motion.—Cause.—Evidence.—Instruction to Jury.—Practice.—A motion for a new trial, based upon alleged error, in the exclusion of evidence, the giving of instructions to the jury, or of law occurring at the trial, must specify particularly the error complained of.

SAME.—Exception to Erroneous Instruction.—When Taken.—The giving of an erroneous instruction to the jury must be excepted to before the return of the verdict, to make such error available as cause for a new trial; and an omission to so except is not cured by an exception to the overruling of the motion for a new trial.

From the Lagrange Circuit Court.

J. B. Wade and *C. U. Wade*, for appellant.

J. D. Ferrall and *A. A. Chapin*, for appellee.

NIBLACK, J.—This was an action by Joseph D. Ferrall, against Thomas Vaughn, on a promissory note for two hundred dollars, payable to one Horace Bishop, at the

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National State Bank at Lima, and assigned to Ferrall before maturity.

Vaughn answered in four paragraphs:

First. A denial of the execution of the note, verified by affidavit;

Second. The general denial;

Third. A want of consideration; and,

Fourth. That after the note sued on was signed by the defendant, and delivered to the payee, Bishop, he, the said Bishop, took said note, with the full knowledge of the plaintiff, and had the name of one Sarah Jones signed to said note as one of the makers thereof, without the consent or knowledge of the defendant, and that the said Bishop had said note so signed by the said Sarah Jones, the better to get it discounted.

The plaintiff replied:

1. In general denial of the whole answer;

2. That he purchased said note before it became due, in good faith and without any knowledge of any defect therein, or of any defence thereto, for a valuable consideration, to wit, the sum of two hundred dollars; and,

3. That before he, the plaintiff, purchased said note, he took it to the defendant and exhibited it to him, and told him that he, the plaintiff, was about to purchase said note, if it was all right, and if he, the defendant, had no defence to it; to which the defendant replied that said note was all right, that he had no defence to, or set-off against, the same, and that he would pay it at maturity; that, relying on said statements of the defendant, he, the plaintiff, thereupon, in good faith and without the knowledge of any defect in said note or of any defence thereto, purchased it of the said Bishop, before it was due, for the sum of two hundred dollars, and took an assignment thereof.

The defendant demurred to the second and third paragraphs of the reply, in the following form:

"Now comes the defendant and files his demurrer to the

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second and third paragraphs of [the] plaintiff's reply, for the reasons that neither of said paragraphs constitutes a good reply to said answer."

The demurrer was overruled, and the defendant excepted.

There was then a trial by a jury, and a verdict and judgment for the plaintiff.

It is insisted that the second and third paragraphs of the reply are insufficient for uncertainty, as well as for want of sufficient facts, because they purport to be a reply to the whole answer, when a portion of it admitted of no reply.

This objection, we think, is not well taken, as these paragraphs ought to be considered as a reply to only so much of the answer as they are applicable, and should be so construed.

We are of the opinion, that the third paragraph was a good reply to the third and fourth paragraphs of the answer. It does not, it is true, aver that the name of Sarah Jones had been signed to the note when the plaintiff exhibited it to the defendant, but we think that is fairly implied from all the other averments in the pleadings. One of the paragraphs being sufficient, and the demurrer being a joint one, as we construe it, the court did not err in overruling the demurrer. *Stanford v. Davis*, 54 Ind. 45; *Adkins v. Wiseman*, 19 Ind. 90; *Whitehall v. The State, ex rel.*, etc., 19 Ind. 27. The demurrer, too, in its form, did not comply with the requirements of the statute in specifically assigning causes of demurrer. *Campbell v. Routt*, 42 Ind. 410.

On the trial, the court instructed the jury, "that the addition of the name of Sarah Jones to the note, after its execution by said Vaughn, was immaterial, and did not affect the liability of said Vaughn on said note."

After the return of the verdict, and before the entry of the judgment, the defendant moved the court for a new trial, and assigned the following causes :

1. That the verdict was contrary to law;
2. That the verdict was contrary to the evidence;
3. That the verdict was not sustained by sufficient evidence;
4. That the court erred in excluding proper evidence;
5. That the court erred in giving erroneous instruction to the jury;
6. For error of law occurring at the trial, and excepted to by the party; and,
7. That the court erred in charging the jury, as herein above stated, setting out the instruction in full.

The defendant reserved an exception to the overruling of his motion for a new trial, and insists, here, that the court erred in overruling it.

The evidence is not in the record, and, hence, there is nothing before us to be considered as regards the first, second and third causes.

The fourth, fifth and sixth causes assigned are too indefinite, in not referring to the particular evidence excluded, or to the alleged erroneous instruction, or to the supposed error of law, complained of. See *Buskirk Practice*, pp. 244, 245, 246.

No exception seems to have been taken to the instruction referred to in the seventh cause, at the time it was given. An erroneous instruction must be excepted to before the verdict is returned, to make the exception available. *Wood v. McClure*, 7 Ind. 155; *Roberts v. Higgins*, 5 Ind. 542; *Jones v. Van Patten*, 3 Ind. 107. Conceding, therefore, the instruction to have been erroneous, a question on which we need not now express any opinion, the giving of it by the court did not constitute a cause for a new trial, for want of an objection to it at the proper time. The reservation of an exception to the action of the court, in overruling the motion for a new trial, did not, and could not, supply the omission to except to the instruction.

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As the case is presented to us, we can not say the court erred in overruling the motion for a new trial.

The judgment is affirmed, at the costs of the appellant, with five per cent. damages.

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125	303
57	186
129	576

REDEMPTION OF REAL ESTATE.—*Sheriff's Sale on Foreclosure of Mortgage.—Redemption by Judgment Creditor.*—Real estate sold at sheriff's sale by virtue of a decree of foreclosure of a mortgage thereon, accompanied by a personal judgment against the debtor, may be redeemed by the judgment creditor, from the purchaser, where the amount realized by such sale is insufficient to satisfy such judgment.

From the Whitley Circuit Court.

C. Clemans and *J. A. Clemans*, for appellant.

A. M. Hooper and *W. Olds*, for appellees.

PERKINS, C. J.—Suit to redeem land.

The complaint is in two paragraphs, substantially alike.

The complaint was held bad on demurrer, and the defendants had final judgment in the cause upon it in their favor.

Interspersed amongst a great deal of irrelevant matter, the following facts were stated in it, viz.:

That Allen Greene, plaintiff, held a note and mortgage on Clarence E. Doane; that said Greene procured a decree of foreclosure of the mortgage, with an order for the sale of the mortgaged property, and execution for the collection of any balance of the decree that might remain unpaid after the sale of said property, and application of the proceeds thereof to the payment of the decree; that the property was sold upon the decree, leaving three hundred dollars thereof unpaid by the proceeds of the sale; that the property was purchased, at the sale, by Isaiah B.

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McDonald, who received the certificate of sale from the sheriff; that, within three months after the sale, plaintiff, Greene, tendered to said McDonald the amount paid by him for the land, at the sale, with ten per cent. interest thereon and costs, etc., and demanded the certificate of sale; that the money was refused by McDonald, whereupon Greene paid the same into the clerk's office for him; that Doane, the judgment debtor, is insolvent, etc.

The complaint contains many other allegations, but we need not set them out.

It is evident, from the argument of counsel in this court, that the demurrer to the complaint was sustained, upon the ground that a judgment plaintiff could not redeem from a sale upon his own judgment. Whether such redemption can take place or not, under the statute, is the principal question discussed by the counsel in this court.

When we use the term judgment debtor, we apply it indiscriminately to a debtor by mortgage decree and by judgment in the common-law sense. The language of the statute is, that "any mortgagee or judgment creditor having a lien upon the same may redeem such real property or interest therein, at any time within," etc. 2 R. S. 1876, p. 220, sec. 1. Allen Greene is shown to be a judgment creditor; and that he has a lien upon the premises is decided by the case of *The State, ex rel., etc., v. Sherill*, 84 Ind. 57. The letter of the statute gives him a right to redeem, and if he is denied that right by the court, it must be done by a construction of the statute, narrowing its literal meaning and operation. But this court has already decided that it will give the statute "a liberal construction." *Davis v. Langsdale*, 41 Ind. 399.

In fact, the two cases above cited substantially decide the case under consideration.

We think the judgment plaintiff had a right to redeem, in this case, from a sale, upon his own judgment.

As to the mode of subjecting to sale, for the payment

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of debts, equitable interests of the judgment debtor, see 2 R. S. 1876, p. 228, and notes on pp. 228 to 293.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

FREEZE v. DEPUY.

PRACTICE.—*New Trial.—Assignment of Error.—Instruction to Jury.—Supreme Court.*—Error in refusing to give an instruction asked to the jury is cause for a new trial, but is not a proper assignment of error on appeal to the Supreme Court.

SAME.—*Record.—Evidence.*—Where, on appeal to the Supreme Court, neither the evidence, nor the instructions given to the jury, are in the record, the refusal of the court below to give to the jury an instruction asked is not available as error.

From the Wabash Circuit Court.

A. Taylor, for appellant.

J. D. Conner, for appellee.

Howk, J.—The only alleged error of the court below, assigned by the appellant in this court, is thus stated:

“The court erred in refusing charges asked to be given by the plaintiff to the jury.”

This alleged error presents no question whatever for our consideration. The matter stated therein was a proper cause for a new trial, in a motion therefor addressed to the court below; but it can not be assigned as an independent error in this court. This rule of practice has long prevailed in this court, and is so well established that it needs no citation of authorities to support it. “The assignment of the causes for a new trial as error is not the proper mode of raising any question embraced in the motion for a new trial.” Buskirk Prac., p. 126, and the authorities there cited.

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But, if this objection to the assignment of error was waived, it would be of no avail to the appellant in this case. The record of this cause does not contain either the evidence on the trial or the instructions of the court below to the jury trying the cause. It may well have been, therefore, and we will so presume in favor of the decision of the court below, that the instructions asked for by the appellant were properly excluded by the court, upon the ground either that the instructions were not applicable to the case made by the evidence, or that they had been substantially given by the court, of its own motion and in its own language. In either of these events, the court below would not have erred in refusing the charges asked for.

We find no available error in the record.

The judgment of the court below is affirmed, at the appellant's costs.

BAKER ET AL. v. ARMSTRONG.

MARRIED WOMAN.—*Promissory Note and Mortgage.*—*Equitable Assignment of.*—A married woman, with the consent of her husband, may make an equitable assignment of a note and mortgage executed to her, by the sale and mere delivery of the same to another.

PRACTICE.—*Pleading.*—*Defective Prayer for Relief.*—*How Objected to.*—An objection to a defective prayer for relief must be presented, not by demurrer, but by a motion to make the pleading more specific.

MORTGAGE.—*Foreclosure.*—*Record.*—*Supreme Court.*—Where, in an action to foreclose a mortgage on real estate, judgment is rendered by default against a party made defendant to answer as to his interest in the mortgaged premises, he can not complain thereof, on appeal to the Supreme Court, if the record does not disclose that he had any interest therein.

SAME.—*Mistake.*—*Action to Reform.*—*Presumption.*—Where, in an action to reform and foreclose a mortgage on real estate, to which several successive holders, under the mortgagor, of the equity of redemption are made parties, the Supreme Court, on appeal, where the evidence is not in

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the record, and where, under the pleadings, all the equities between the parties might have been given in evidence, will presume in favor of the record.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

R. P. Davidson and *J. C. Davidson*, for appellee.

PERKINS, C. J.—Suit to foreclose a mortgage, and to correct mistakes in the mortgage and in the note intended to be secured by it.

The suit was by James K. Armstrong, against Washington S. Baker, Nancy J. Davidson, David Davidson, Christopher S. Hiatt and Jacob Stroup.

Baker was the maker of the note and mortgage; Nancy J. Davidson was the payee and the grantor of the land intended to be embraced in it, to Baker. David Davidson was her husband. Hiatt was the grantee of Baker, and Stroup of Hiatt. Possession was taken by each of the purchasers upon the purchase.

Armstrong, the appellee, the plaintiff below, is the equitable assignee of the note and mortgage, the same having been transferred to him by the Davidsons, and he prosecutes this suit against all the parties supposed to be interested in the property.

The defendants Nancy J. Davidson, David Davidson and Christopher S. Hiatt made default.

Baker and Stroup defended. They severally demurred to the complaint, and their demurrers were overruled, and exceptions saved.

They severally answered.

Replies were filed. Issues were formed, and were tried by the court, and a finding made for the plaintiff. A decree was rendered pursuant to the finding, and no exception was taken to it by the parties present in court. No motion in writing for a new trial was filed, and the evidence is not in the record.

The first point made by the appellants is, that the plain-

tiff had no title to the note and mortgage, for the reason that a married woman, with the consent of her husband, could not make an equitable transfer of the note and mortgage by sale and delivery of the same to the purchaser. *Moreau v. Branson*, 37 Ind. 195, and *Cox's Adm'r v. Wood*, 20 Ind. 54, settle this point. She could make such transfer.

The second point made is, that the complaint is bad for want of a sufficient prayer.

In *Bennett v. Preston*, 17 Ind. 291, a demurrer for want of sufficient facts was filed, and, on argument, the objection made was, want of a sufficient prayer. The court said:

"The first cause of demurrer was not available, because the complaint made a case for some kind of relief. And a demurrer under the fifth subdivision of section 50 of the code, (2 R. S., p. 38,) viz., that the complaint does not state facts sufficient, etc., will be overruled, if on the facts stated the plaintiff is entitled to any relief whatever, although not that demanded. *Stuyvesant v. The Mayor, etc.*, 11 Paige, 414; Voorhies' Code, *supra*. Defect in the prayer for relief is not ground of demurrer, but for a motion to make more specific." *Goodall v. Mopley*, 45 Ind. 355. See 2 R. S. 1876, p. 188, sec. 380, and notes.

In this case, facts were stated making a valid complaint.

As to the defendant Hiatt, the complaint alleged, that it was understood that he had some interest in the land mortgaged, and he was made a party that he might answer touching his interest, if any he had. As we have seen, he failed to answer, and the record does not disclose that he had any interest. It shows that at one time he might have had, but that he had parted with it, if he had any;—whether by quitclaim deed, or otherwise, does not appear; nor does it appear that he had paid any thing on the land. Nothing appears in the record showing any error of which he can complain.

The Davidsons did not appeal.

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As to the defendants Baker and Stroup, they severally filed six paragraphs of answer, to which there were replies, forming issues involving all material questions that could arise in the cause, and under which evidence was admissible, elucidating all points touching the transactions between all the parties, and disclosing the facts as to notice, the *bona fides* of the transfers, and all the equities between the parties. See *Conwell v. Clifford*, 45 Ind. 392.

The evidence not being in the record, we presume in favor of the correctness of the decree rendered.

The judgment is affirmed, with five per cent. damages and costs.

57	192
134	58
57	192
145	151
57	192
180	600
180	602

THE TOWN OF CENTERVILLE v. WOODS ET AL.

TOWN.—Pleading.—Presumption.—In an action by a town of this State, it will be presumed, nothing to the contrary appearing, that the plaintiff has been organized under the general law of this State for the incorporation of towns.

SAME.—Streets and Alleys.—Duty of Town.—It is the duty of a town to keep its public streets and alleys in a safe condition for use, in the usual mode, by travellers.

SAME.—Action for Damages.—Defect in Street.—Act of Third Person.—In an action against a town, to recover damages for injuries received by a person while travelling on one of her public streets, by reason of a defect therein, it is no defence that such defect was caused by the act of a third person, without the consent of the city.

SAME.—Action by Town for Repayment.—Where, in such case, damages are recovered from the town for such injury, the latter, in an action against such third person, may compel him to repay such damages.

SAME.—Cost of Repairs may be Recovered from Person Injuring Street.—Where a third person has unlawfully injured a public street of a town, which he has refused, on demand, to repair, and the same has been repaired by the town, he is liable to the latter for the cost of such repairs.

From the Wayne Circuit Court.

T. J. Study and *H. U. Johnson*, for appellant.

W. A. Peelle, for appellees.

Howe, J.—In this action, the appellant, as plaintiff, sued the appellees, as defendants, in the court below. The appellees demurred to appellant's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court below, and to this decision the appellant excepted. And, appellant refusing to plead further, judgment was rendered by the court below, on the demurrer, in favor of the appellees and against the appellant.

The sustaining of the demurrer to the complaint by the court below is the only alleged error assigned by the appellant, in this court. This alleged error presents for our consideration this one question: Are the facts stated in the complaint sufficient to constitute a cause of action, in favor of the appellant and against the appellees? As necessary to a proper understanding of the question thus presented, we give a summary of the facts stated in the complaint.

The appellant alleged, in substance, that it was an incorporated town under the laws of this State; that, since its incorporation, it had been and was the appellant's duty to keep the public streets and alleys of said town in a safe, good and convenient condition to be used and travelled over and along by the public; that there were, within the corporate limits of said town, among others, two streets known and designated as Main and Main-Cross streets, which were laid out and established by said town, as public streets thereof, more than twenty years ago, and had been, during all that time, used by said town and the public generally as public streets and thoroughfares of said town; that on or about the 1st day of September, 1874, the appellees, being the owners of certain pieces of real estate situated along and near said two streets, and within the corporate limits of said town, for the purpose of draining the cellars under the buildings on said pieces of real estate so owned by them, without the consent of

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the appellant first procured, dug and caused to be dug, along and across said Main street and said Main-Cross street, and within the corporate limits of said town, a ditch or sewer, two hundred yards long, four feet wide, and six feet in depth; that the appellees, after having dug said sewer or ditch, failed, neglected and refused to fill up and cover said ditch or sewer, so as to put said streets, where said ditch or sewer was dug, in a good, safe and passable condition for travel; that, by the digging of said ditch or sewer by the appellees, and by their failure, neglect and refusal to fill up or cover said ditch or sewer, the said streets were, where said ditch or sewer was dug, put and left by the appellees in a dangerous, unsafe and inconvenient condition to be used and travelled by the public, to the appellant's damage in the sum of fifty dollars. And the appellant averred, that the appellees, although often requested by the appellant, before the bringing of this suit, to fill up said ditch or sewer and repair said two streets, where said sewer was dug, and put said streets at said place in a safe condition for use and travel, failed, neglected and refused so to do; that, after the appellees dug said sewer and had failed, neglected and refused to fill up the same, and to repair and put said streets, where said sewer was dug, in a safe condition for use and travel, for a long time, to wit, twenty days, the appellant was required to and did fill up said sewer and said streets, where said sewer was dug, to prevent damage and injury to persons using and travelling said streets; and that in filling up said sewer, and in repairing said streets, the appellant necessarily expended the sum of fifty dollars, which sum it was worth to fill up said ditch or sewer, and which sum was due and unpaid; and the appellant demanded judgment for fifty dollars, and for other proper relief.

It does not appear, from appellant's complaint, under what law the appellant was incorporated; but it will be presumed, nothing appearing to the contrary, that the

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appellant was incorporated under the general law of this State for the incorporation of towns. *The Town of Brazil v. Kress*, 55 Ind. 14.

By the first section of an act to enable incorporated towns to lay out, open, grade, and improve streets and alleys, etc., approved April 27th, 1869, it is provided, among other things, "That the board of trustees of incorporated towns of this State shall have exclusive power over the streets, alleys, highways and bridges, within the corporate limits of such town," etc. 1 R. S. 1876, p. 890. And by the 9th clause of section 22 of the general law of this State, providing for the incorporation of towns, etc., approved June 11th, 1852, it is provided, that the board of trustees shall have power "To lay out, open, grade and otherwise improve the streets, alleys, sewers, sidewalks and crossings, and keep them in repair, and to vacate the same." 1 R. S. 1876, p. 879.

Where such an exclusive and plenary power is conferred by law on an incorporated town, over the streets and alleys within its corporate limits, the correlative duty necessarily arises therefrom to keep such streets and alleys in such repair as that the inhabitants of said town and the general public may safely and conveniently pass and repass over, along and across such streets and alleys. *Lowrey v. The City of Delphi*, 55 Ind. 250. The law is well settled, that municipal corporations, having the powers ordinarily conferred upon them over the streets, alleys and bridges within their limits, "owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers, and are liable in a civil action for special injuries resulting from neglect to perform this duty." Dillon Munic. Corp., sec. 789, *et seq.*, and authorities cited.

But, while this liability unquestionably exists, as against the municipal corporation, it may be and often is the case, that the unsafe condition of the street or alley has been brought about by the wrongful act or omission of

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some third party. In such a case, the law is well established, that "A municipal corporation, which has been made liable for the consequences of an obstruction or excavation made in a highway by another, has a remedy over against the author of the nuisance, where no affirmative fault is imputable to the corporation in the matter. Thus a municipal corporation which has been compelled to pay damages to one injured by falling into an unguarded area made by the defendant has a remedy against the latter for repayment. It makes no difference that the work was done under the implied (though not express) license of the corporation; for a license to make the excavation is not a license to leave it open and unguarded, and no such license will be presumed." Shearman & Redfield Negligence, sec. 154. *Chicago City v. Robbins*, 2 Black, 418.

The theory of the law, as thus enunciated, is this: That while the municipal corporation, by reason of its exclusive power over the streets and alleys within its corporate limits, must be held to a strict and rigid performance of the duty, necessarily resulting from such exclusive power, to keep such street and alleys in a safe condition for the ordinary use thereof by the public, and will be liable in damages for injuries resulting from its neglect to perform such duty; yet, where it appears, in such a case, that the unsafe condition of the street or alley has been brought about by the wrongful act or omission of a third party, the municipal corporation shall have its remedy against such third party for the repayment of the damages it has sustained.

We know of no good reason why this doctrine should not be made applicable to the reimbursement to the municipal corporation of such damages or expenses, as it may have incurred by reason of the wrongful act of a third party, in excavating its streets or alleys, without an express license therefor, or by the wrongful omission of such third party, for an unreasonable time, to put such

street or alley so excavated in a safe condition for the ordinary use thereof by the public. The law imposes the duty on the municipal corporation to put and keep its streets and alleys in a safe condition for the ordinary use thereof by the public. Where a ditch has been dug along or across a street or alley, within the corporate limits of a town or city, and has been left in an unsafe condition, such municipal corporation can not escape liability for the damages occasioned by or resulting from such ditch, upon the plea that the ditch was dug or left by a third party, without its license or authority. It is the duty of the municipal corporation, in such a case, to put the street or alley in a safe condition for its ordinary use by the public; and if, in so doing, it incurs expenses, it seems to us, that such third party should be held liable to such town or city for the reasonable expenses thus incurred.

In the case at bar, the appellant averred in its complaint, that it had necessarily expended the sum of fifty dollars, which sum it was worth to fill up the ditch or sewer, which the appellees had dug along and across two of the streets, within the appellant's corporate limits. Manifestly, from the averments of the complaint, the appellees' acts, in digging said ditch or sewer, and in leaving the same open for an unreasonable time, were the cause or occasion for the necessary expenditure by the appellant of the sum of fifty dollars, in closing up said ditch or sewer; and it is clear, therefore, that the appellant was damaged by such acts of the appellees to the amount of such necessary expenses.

In our opinion, therefore, the court below erred, in sustaining the appellees' demurrer to the appellant's complaint.

The judgment of the court below is reversed, at the appellees' costs, and the cause is remanded, with instructions to the court to overrule the demurrer to the com-

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plaint, and for further proceedings in accordance with this opinion.

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DECEDENTS' ESTATES.—Executor and Administrator.—Power of, over Personal Property.—Common Law.—At common law, an executor or administrator had the same property in, and power over, the personal property of a decedent, as did the latter himself in his lifetime, but that power has been limited in this State by legislation.

SAME.—The common law, except where it is inconsistent with the constitutions of the United States and of this State, and with the statutes of Congress and of this State, has always been, and is, the law of this State.

SAME.—Public Sale.—How Avoided.—Fraud.—Where personal property belonging to a decedent's estate is sold at public sale by the executor or administrator, the purchaser thereby acquires the same title thereto as was had by the decedent in his lifetime, though the sale may be wholly unnecessary; and such sale can only be avoided for fraud or collusion practised by the executor or administrator and the purchaser.

SAME.—Private Sale.—An executor or administrator must sell the personal property of his decedent's estate at public auction only, unless, upon application to the proper court, he obtains an order authorizing a private sale.

SAME.—National Bank Stock.—How Transferable.—Private Sale of.—Purchaser.—Principal and Agent.—Pleading.—An executor, who was also one of the directors of a certain national bank, without being authorized so to do by either the terms of his testator's will or the order of any court, and without its being necessary for the payment of debts, sold to a purchaser, at private sale, without notice, certain shares of stock in such bank belonging to his testator, and assigned and transferred the certificate of stock to the purchaser, taking therefor the promissory note of the latter, which was subsequently paid to the executor, who converted the same to his own use. Such sale was never reported to, nor confirmed by, any court, and the executor sat with the board of directors of such bank, and voted with them, in making a transfer of such stock, upon the books of the bank, to the purchaser, though no new certificate of stock was issued to him. Such executor, and his sureties, becoming insolvent, he was removed and his successor appointed, who brought an action against such bank and purchaser, to have such sale and transfer set aside, and to compel the issuance to him, as executor, of a certificate of such stock, or to

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recover the value of the same, alleging in his complaint the foregoing facts, and that he had made demand of the defendants.

Held, on demurrer to the complaint, that such stock was personal property belonging to such estate.

Held, also, that the section of the statute making promissory notes negotiable by endorsement (1 R. S. 1876, p. 635, sec. 1,) is not applicable to the sale and transfer of a certificate of bank-stock.

Held, also, that, by the 12th section of the act of Congress approved June 3d, 1864, (R. S. U. S., p. 999, sec. 5139,) in relation to the incorporation of national banks, shares of stock in any such bank are transferable only on the books of the bank.

Held, also, that the endorsement of such certificate, and the transfer of such stock, by the executor passed no title to the purchaser.

Held, also, that the purchaser at such sale was bound to know whether or not such executor had power to make the sale.

Held, also, that where one person assumes to have the right to dispose of the property of another, the purchaser buys at his peril.

Held, also, that the complaint is sufficient.

From the Johnson Circuit Court.

C. A. Korbly, for appellant.

T. W. Woollen, G. M. Overstreet, A. B. Hunter, C. Baker, O. B. Hord and A. W. Hendricks, for appellees.

Howe, J.—The appellant, as plaintiff, sued the appellees, as defendants, in the court below.

Each of the appellees demurred separately to the appellant's complaint, for the want of sufficient facts therein to constitute a cause of action; each of which demurrers was sustained by the court below, and to these decisions the appellant excepted. And thereupon judgment was rendered by the court below, upon said demurrers, in favor of the appellees and against the appellant, from which this appeal is here prosecuted.

In this court, the appellant has assigned, as alleged errors, the decisions of the court below upon the separate demurrers of the appellees to appellant's complaint. The questions thereby presented for our consideration relate exclusively to the sufficiency of the facts stated in said complaint to constitute a cause of action. To the proper consideration of these questions, a summary, at least, of

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the facts alleged in appellant's complaint is indispensable; and we therefore adopt the abstract of the complaint in appellant's argument, which we have found, by comparison, to be substantially correct.

The complaint alleges substantially, that the testatrix, Ruth B. Shippen, deceased, in her lifetime, was the owner of fifty shares of stock in the Second National Bank of Franklin, for which she held a certificate dated December 13th, 1865, signed by the president and cashier, and sealed with the corporate seal of said banking corporation.

That said testatrix died February 16th, 1868, the owner of said stock; that her will was duly proved, and admitted to probate, on the 31st day of March, 1868; that, by her said will, she appointed Edwin G. Whitney her executor, to whom letters testamentary were issued by the clerk of the common pleas court of Jefferson County, Indiana, where the will was proved; that said letters were confirmed by said court, and said Whitney qualified as such executor.

That said certificate of stock came to his hands as executor and was inventoried and appraised by him.

That on the 17th day of January, 1872, the said Edwin G. Whitney sold at private sale, without any notice whatever, said fifty shares of stock in said bank to the defendant William C. Wheat; that said Whitney did not, before making such sale, obtain an order from the Jefferson Common Pleas Court, or any other court, authorizing such private sale.

That, pursuant to such sale, said Whitney as executor transferred said certificate of stock to said William C. Wheat for a large sum of money, to wit, — dollars, for which said Wheat gave said Whitney his note payable in thirty days, which he afterward paid said Whitney; that said transfer was made by a blank indorsement, as follows:

"E. G. Whitney, executor under the will of the estate of Ruth B. Shippen."

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And said certificate, so endorsed, was delivered to said Wheat, who surrendered the same to said bank, which, by a two-thirds' vote of its board of directors, transferred said stock from the name of Ruth B. Shippen to said William C. Wheat; but said bank did not then, and has not since, issued a new certificate to said Wheat.

That said Edwin G. Whitney made no report of the said sale of said stock to said court, or any other court, but converted the proceeds of the sale of the same to his own use, and became wholly insolvent, and the legatees named in said will received no manner of benefit from said sale or the proceeds thereof. And the sole legatees of said testatrix at the time of said sale were, and still are, minors of tender years, and were until a long time after said sale, to wit, until the year 1875, without guardianship.

That said sale of stock was not necessary for the payment of debts or for any other purpose under said will, which contains no power or direction of sale whatever; that said Edwin G. Whitney had no interest in said estate other than a naked trust as executor; that said sale was in no manner confirmed by said court; that said Whitney, at the time of said sale, was a director of said bank and a stockholder therein, and, as such director, sat with the board of directors and voted upon the transfer of said stock.

That said Whitney became insolvent, and, his surety upon his bond as executor having become insolvent and being out of the jurisdiction of the State of Indiana, said Whitney was removed from his trust as such executor by the judgment of the Jefferson Circuit Court, at its February term, 1875; that afterward, to wit, on the 22d day of March, 1875, said court appointed the plaintiff administrator, with the will annexed, *de bonis non*, of the said estate of Ruth B. Shippen, deceased, and he qualified as such administrator; that plaintiff made demand before bringing this suit.

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That said stock, at the time of said sale, was worth seven thousand five hundred dollars, and that said bank has declared dividends thereon since that time, amounting to two thousand five hundred dollars, which said Wheat received.

Upon the facts alleged in his complaint, the appellant prayed judgment, that said transfer of said shares of stock be decreed to be null and void, and that the appellees be compelled to re-transfer the same to the estate of said Ruth B. Shippen, and that the said bank, appellee, be compelled to reissue a certificate for said fifty shares of stock to the appellant, as administrator, etc., of said estate; or, if that could not be done, then for judgment for the value of said stock, to wit, for seven thousand five hundred dollars, against said bank, and that an account be taken of the dividends declared on said stock, and that the appellant recover judgment for the amount of said dividends, with interest thereon from the time they were severally declared, and for other proper relief.

The real question presented by the record of this cause, and by appellant's assignment of errors thereon, for our consideration, may be thus stated: Were the sale and transfer of the bank-stock, described in the complaint, a valid, legal and binding sale and transfer, or were they inoperative and void?

By the 12th section of the act of Congress, approved June 3d, 1864, under which the appellee The Second National Bank of Franklin was incorporated, it is provided, that the capital stock of such a bank "shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." Acts of Congress 1864, p. 102; R. S. U. S., p. 999, sec. 5139.

The shares of bank-stock described in appellant's complaint in this action, at the death of Ruth B. Shippen, were personal property belonging to the estate of said

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decedent. It was averred in appellant's complaint, and admitted by appellees' demurrers thereto, that the will of said decedent gave no power or direction whatever for the sale of said bank-stock to the executor named in the will. It follows, therefore, that the proper answer to the question before stated involves the consideration of, and depends upon, the powers of an executor or administrator, under the law of this State, over the personal property which belongs to his decedent's estate. We say "executor or administrator," because the law is, that, after administration has been granted, "the power of an administrator is equal to, and with, the power of an executor." 2 Williams Executors, 6th Am. ed., p. 992.

At common law, an executor or administrator had the same property in, and, of course, the same powers over, the personal effects or estate of his decedent, that such decedent had at and before his death. In *Whale v. Booth*, 4 T. R. 625, note *a*, Lord MANSFIELD, C. J., said: "The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they can not be followed by the testator's creditors."

The common law, except in so far as it may be inconsistent or in conflict with the constitutions of the United States and of this State, and the acts of Congress and the statutes of this State, is, and always has been, the law of this State. But it may be well doubted, if an executor or administrator ever had, in this State, the same absolute property in, or power over, the personal effects or estate of his decedent as at common law. However that may be, it is very certain that the power of an executor or administrator over the personal property of his decedent has been for many years past, and is now, in this State, limited and confined by legislative enactment. And that the common-law rule in regard to the absolute property of an executor or administrator in, or his absolute power over, the personal effects or estate of his decedent, is not,

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and has not been since May 6th, 1853, the law of this State, is conclusively shown, in our opinion, by the first section of "An act regulating descents and the apportionment of estates," approved May 14th, 1852, whereby it was and is provided, that the "personal property of any person dying intestate, shall descend to his or her children in equal proportions." 1 R. S. 1876, p. 408, sec. 1. The power to sell the personal property of the decedent, with certain exceptions, still exists in the executor or administrator, but the modes of sale and the power to sell are given and prescribed by statute.

The power to sell the personal property of a decedent in this State is a power conferred by the proper court, or the clerk thereof, acting under and in pursuance of the provisions of "An act providing for the settlement of decedents' estates," etc., approved June 17th, 1852. 2 R. S. 1876, p. 491.

The issuance of letters testamentary to an executor, or of letters of administration to an administrator, by such court or clerk, will authorize, and make it the duty, of the executor or administrator to sell the personal property of his decedent, with certain exceptions, at public auction, as provided in sections 48 and 49 of said last mentioned act, and in section 2 of "An act to repeal" the 50th section of said act of June 17th, 1852, "and providing for credit on the sale of personal property," etc., approved March 1st, 1855. 2 R. S. 1876, p. 509, and note.

If an executor or administrator should sell at public auction the personal property of his decedent, or any part thereof, as provided for in the sections last mentioned, there could be no doubt, we apprehend, that the purchaser would thereby acquire such title as the decedent had when living to the property purchased, even if the sale was wholly unnecessary. Nothing but fraud or collusion between the executor or administrator and the purchaser, in which both participated, would avoid a sale so made. But the sale of the bank-stock described in appel-

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lant's complaint was not made at public auction by the executor of the decedent, to the appellee William C. Wheat, as provided for in said last mentioned sections. It was a private sale, confessedly made by the executor without any necessity whatever therefor, without any of the formalities or proceedings required by law for the making of such sale, without any authority to the executor to make such sale, except such, if any, as may have been conferred by his letters testamentary, and from which sale the legatees or heirs at law of the decedent have never derived, and can not possibly derive, any benefit whatever.

Our inquiry now is, whether or not such a sale as the one we have just described is valid, legal and conclusive upon the rights of all parties interested, under the law of this State. The answer to this inquiry depends chiefly upon the construction given to the 60th section of the act providing for the settlement of decedents' estates, etc., before referred to. This section is as follows:

"Sec. 60. Whenever the court of common pleas shall be satisfied that it would be for the advantage of such estate to sell any part of the personal property thereof at private sale, such court may authorize the executor or administrator to thus sell the same; but such property shall in no case be sold for less than its appraised value; nor shall such executor or administrator become the purchaser thereof; and a return of such sale shall be made within the time prescribed by the court, not to extend beyond three months; and bond, with approved surety, shall be taken for the purchase-money, as in case of public sales." 2 R. S. 1876, p. 512.

This section, with the exception of the provision for making a return of such sales, is a substantial reenactment of sections 169 and 170 of chapter 30 of the Rev. Stat. 1843, p. 518, which continued to be the law on the subject thereof until the enactment of said section 60. As indicative, to some extent, of the legislative will and intention in the enactment of said section 60, reference is made

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to form "No. 25.—Petition for private sale of decedent's personal estate." 2 R. S. 1876, p. 564. By this form, the executor or administrator is required to make oath that it would be advantageous to the estate of his decedent that the personal property mentioned should be sold at private sale, in his petition to the proper court for an order authorizing him to make such sale. And of this form and others there given it is provided, in and by the 194th section of the said act of June 17th, 1852, that "The following forms shall be substantially adopted, wherever they are applicable, in the execution of a will, or administration of an estate of a decedent, the names therein being changed to suit each particular case." 2 R. S. 1876, p. 558.

Much learning has been displayed in the able and exhaustive briefs of counsel on both sides of this cause, in the discussion of the question, whether the provisions of said section 60, before cited, should be regarded as mandatory, or as merely directory. It is unnecessary for us to follow them in this discussion, or to consider in detail the numerous authorities with which counsel on each side have supported their respective positions. It is clear to our minds, that our statute providing for the settlement of decedents' estates, and our statute regulating descents, are both repugnant to and inconsistent with the common-law doctrine of the absolute property of an executor or administrator in, or of his absolute power over, the personal effects or estate of his decedent. Where this repugnancy or inconsistency exists, of course the statute must prevail and constitute the law. Here, the personal property of a decedent is the property of such decedent's estate, and, at most, his executor or administrator has but a qualified power over such property. He may sell such personal property it is true, but he must sell the same at public auction, and can not sell it otherwise, unless, upon application to the proper court, he obtains an order authorizing a private sale. His position or office of execu-

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tor or administrator confers on him no other power or authority over his decedent's estate than the law, under which he holds his office or position, confers. And, if further power or authority over said estate is desired or necessary for any purpose, such executor or administrator can only obtain the same by an order of the court by which he was appointed, in a proper case, to be shown by his verified petition, and other proof if required. So the law is and has been written in this State for more than thirty years past; and so, we think, it ought to be construed in the interest of every citizen and of those who are to come after him. The estates of the dead are a trust to the courts, and every legal safeguard to their proper administration ought to be faithfully sustained. In the case of *French v. Edwards*, 13 Wal. 506, in discussing the subject of mandatory and directory statutes, the Supreme Court of the United States, MR. JUSTICE FIELD delivering the opinion, use this language: "But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

This is good doctrine, well stated, supported by authority, and is applicable to the section of our statute which we have been considering. For the reasons given, we hold that section 60 of the act providing for the settlement of decedents' estates, etc., is mandatory in its provisions, and that an executor or administrator can not sell the personal property of his decedent, or any part thereof, at private sale, without having been authorized so to do by an order of the court having jurisdiction of the administration of his decedent's estate.

In the case of *Ramey v. McCain*, 51 Ind. 496, it was

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held by this court, that an administrator could not maintain an action for the price of personal property of his decedent's estate, sold and delivered by the administrator at private sale, where it did not appear that the property had been duly appraised, and that the administrator had been authorized by the proper order of the proper court to sell said personal property at private sale.

It is said, however, that, even if said section 60 is mandatory in its requirements, yet a certificate of bank-stock, like a promissory note, is a mere chose in action; and that, as it has been held by this court that the assignment or indorsement of a note by the executor or administrator of the payee was sufficient to authorize an action by the assignee or indorsee against the maker, therefore the indorsement of the certificate of bank-stock in this case, it must be held, was sufficient to pass the title to said stock to the indorsee of said certificate. In the case of *Thomas v. Reister*, 3 Ind. 369, and in the case of *Hamrick v. Craven*, 39 Ind. 241, upon the authority of the former case, it was held by this court, that an executor or administrator could transfer by assignment a note due to his decedent, so as to vest the title thereto in the assignee. But it does not appear from the opinion in either of those cases, that the power of an executor or administrator to sell at private sale promissory notes, due or to become due to his decedent's estate, without an order of the proper court authorizing such sale, was a question presented to, or considered by, the court. We do not think, however, that the cases cited have even the slightest bearing on the case at bar. The difference between a promissory note and a certificate of bank-stock is so wide and marked, that a rule of law governing the transfer of the former is by no means applicable to the latter. It is provided by statute, in this State, that promissory notes "shall be negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively." 1 R. S. 1876, p. 635, sec. 1. But this statute, broad and comprehensive as

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are its terms, has no application whatever to certificates of corporation stock; nor have we any statutory provision which makes such certificates negotiable by assignment or endorsement thereon, so as to vest any title to the shares of stock therein mentioned in the assignee or indorsee of such certificate. Indeed, by the express terms of the act of Congress, under which the appellee, the Bank, is incorporated, its shares of stock are transferable only on the books of the bank. In the case of *The Mechanics' Bank v. The New York, etc., R. R. Co.*, 13 N. Y. 599, the Court of Appeals of New York, Comstock, J., delivering the opinion, say, on page 627: "Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member."

And even as to promissory notes the endorsement or assignment thereof by an executor or administrator will not, in all cases, pass the title of his decedent's estate therein to the endorsee or assignee thereof. In the case of *Thomasson v. Brown*, 43 Ind. 203, it was held by this court, that an administrator could not barter and assign promissory notes belonging to his decedent's estate, for goods for his own use; and if the assignee had knowledge, even from the nature of the transaction, that the administrator was thus acting in violation of his trust, the right of property in the notes would not be divested, and the assignee could not hold the notes or profit by his purchase, as against the creditors or heirs of the decedent.

It is very clear, we think, that the blank endorsement by the executor, set out in the complaint in this case, of the certificate of bank-stock mentioned therein, was insufficient to pass any title in or to said stock to the endorsee of said certificate. But it is alleged in said complaint, that the executor of Ruth B. Shippen "made a

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similar transfer on the books of the bank." This latter transfer, we apprehend, would have been sufficient to pass the title of the decedent's estate in and to said bank-stock, if the executor had been authorized by an order of the proper court to make such transfer.

The appellees in this case were bound to know that the executor of Mrs. Shippen could not make a valid and legal sale and transfer of said bank-stock, at private sale, until he had first been authorized so to do, by an order of the proper court; for such was and is the law of this State, which its citizens, individual or corporate, are conclusively presumed to know. When, therefore, the executor proposed to sell and transfer said bank-stock, at private sale, it seems to us, that common prudence should have dictated to each of the appellees an enquiry into the executor's power and authority to make any such sale. True, he was one of the directors of the bank, and it may have been that the appellees had unbounded confidence, and perhaps rightfully so, in his integrity; but this confidence should not have induced them to forget one of the plainest rules of business, and that is, that where one assumes to dispose of the property of another, whether that other be living or dead, the acting party should always be required to produce and prove his authority. If, in the lifetime of Ruth B. Shippen, the party whom she named as executor of her will had assumed to sell and transfer said bank-stock, it can hardly be presumed that the appellee Wheat would have purchased and paid for said stock, or that the appellee, the Bank, would have allowed a transfer of said stock, without the production of an express authority therefor from Mrs. Shippen. Now suppose that, in such a case, the party assuming to sell had produced a power of attorney from Mrs. Shippen, authorizing him to sell the stock at public auction; could any one have been induced to believe, that a private sale and transfer of said stock by the attorney in fact would be a valid and legal sale and

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transfer, and binding on Mrs. Shippen? Suppose, however, that the power of attorney, which authorized and directed the sale of the stock at public auction, had contained a clause to the effect, that, if the judge of a certain court would certify that the private sale of the stock would be of advantage to her, then her attorney might sell at private sale; it is improbable, that any one would have purchased the stock from the attorney at private sale, without the production of the certificate mentioned, for the reason, that, if no such certificate had been given, the sale would have been without authority and of no binding force.

It is alleged in appellant's complaint, that the executor of the decedent, "at the time of said sale and transfer of said stock, was a stockholder of said bank, in his own individual right, and a director thereof, and as such sat with the board of directors at the time they ordered the transfer of such stock to the said Wheat, on the books of said bank." It is manifest, we think, that, under the averments of the complaint, the executor, who was also a director, must have known that he had no authority whatever to make the said sale and transfer of said stock, and that, in so doing, he was violating the trust and confidence reposed in him by the dead, to the injury of the living, whose infancy prevented them from taking care of their property. Just how far the appellee, the Bank, is affected and bound by the knowledge of its director, is a question in regard to which the authorities are in much confusion. It is a question, which perhaps we need not decide in this case. For we do not doubt, that where one purchases stock, belonging to a decedent's estate, from a person claiming to be such decedent's executor or administrator, at private sale, in this State, the purchaser is bound to know that such sale has been authorized by the proper order of the proper court, or he buys at his peril. And the plain legal duty of a bank or other corporation to its stockholders is, that such bank

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or other corporation should never permit any other person than the stockholder in person to transfer stock on its books, without the production and proof of the authority so to do. Angell & Ames Corp., 10th ed., p. 588, sec. 582.

In conclusion, our opinion is, that appellant's complaint stated facts sufficient to constitute a cause of action against each of the appellees, and that the court below erred in sustaining their respective demurrers to said complaint.

The judgment of the court below is reversed, and the cause is remanded, with instructions to overrule the demurrers to the complaint, and for further proceedings.

Petition for a rehearing overruled.

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VENDOR AND PURCHASER.—*Alienation of Real Estate.*—*Conveyance.*—*Quantity Conveyed, "More or Less."*—*Representations.*—*Fraud.*—*Action for Purchase-Money.*—*Pleading.*—In an action against the purchaser of a tract of real estate, conveyed to him by warranty deed as containing a specified number of acres, "more or less," to recover for purchase-money evidenced by a promissory note, and to foreclose a mortgage given to secure its payment, it is no defence to answer, that, during the negotiations resulting in such conveyance, representations upon which the defendants relied, and which subsequently proved to be untrue, were made by the vendor to the purchaser, that the tract so conveyed contained a certain number of acres, unless it be also alleged that such representations were made fraudulently and with intent to deceive the purchaser.

SAME.—*Assuming Encumbrance.*—*Payment of, by Grantor.*—*Action against Grantee.*—*Subrogation.*—*Foreclosure.*—*Judgment.*—*Valuation Laws.*—*Attorney Fee.*—*Principal and Surety.*—A tract of real estate, which was encumbered by a mortgage executed by the owner to another, to secure the payment of a promissory note for a certain sum, waiving valuation laws and stipulating for attorney fees, was conveyed by the owner to a third person by a deed, which, particularly describing such encumbrance, provided that the grantee, as part of the consideration for such conveyance,

57	319
124	325
57	212
135	330
57	212
158	400
57	212
166	253

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should assume and pay the same at maturity, "in accordance with the terms thereof." Such grantee having made default in such payment, his grantor paid off the same and brought an action against the grantee to recover the same.

Held, that the plaintiff, being himself bound for such debt to the mortgagee, by paying off the same, became subrogated to the rights of the latter, and was entitled to a judgment for the amount of such note, waiving valuation laws and including attorney fees, and to have foreclosure of such mortgage.

Held, also, that, as between the defendant and plaintiff, their relations became, by such contract of conveyance, that of principal and surety respectively on such debt.

From the Marion Superior Court.

C. W. Smith, R. O. Hawkins and C. H. Remy, for appellants.

G. H. Chapman, U. J. Hammond and J. J. Hawes, for appellee.

NIBLACK, J.—The appellee, George B. Edwards, on the 22d day of January, 1872, purchased of William Clinton Thompson, one of the defendants in the court below, a tract of land adjoining the city of Indianapolis, for the sum of fourteen thousand dollars, and on that day received a conveyance for the same, by warranty deed, from the said Thompson.

The land was described in the deed as "All that part of the east half of the north-west quarter of section twenty-six (26), township sixteen (16) north, range three (3) east, which lies east of the Michigan road and north of the county road which runs north-easterly through said quarter section, the parcel now conveyed containing thirty-eight acres, more or less."

To provide for the payment of the purchase-money, Edwards executed to Thompson, on the same day, four promissory notes, each for the sum of three thousand five hundred dollars, and payable without relief from valuation or appraisement laws, with six per cent. interest from date, and ten per cent. after maturity, and five per cent. attorney fees in case of suit for collection. The first

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was payable one year, the second two years, the third three years, and the last four years, after date.

Edwards also executed to Thompson a mortgage on the land so purchased by him, to secure the payment of these notes, describing the land substantially as above, and referring to it also as "containing thirty-eight acres, more or less."

On the 18th day of June, 1873, after the first promissory note above referred to had become due and had been paid by Edwards, he, the said Edwards, sold and conveyed the same tract of land to the appellants, Alanson K. Josselyn and Homer R. Josselyn, describing the land in his deed of conveyance to them as "that part of the east half of the north-west quarter of section twenty-six (26), township sixteen (16) north, of range three (3) east, which lies east of the Michigan road and north of the county road that runs north-easterly through said quarter section, and which, under such description, was conveyed to the said George B. Edwards by William Clinton Thompson, by deed of date January 22d, 1872."

This deed also contained a stipulation, as follows:

"The deed of conveyance herein is intended to be, and is, subject to a certain mortgage by the said George B. Edwards to the said William Clinton Thompson, of date January 22d, 1872, securing three notes, each of them for the sum of thirty-five hundred dollars (\$3,500), becoming due respectively in two, three and four years from their date, given by the said George B. Edwards for [the] purchase-money of all the real estate hereby conveyed either to the said Homer R. Josselyn or the said Alanson K. Josselyn; and these notes, together with the interest accrued and to accrue thereon, and in accordance with the terms thereof, the said Homer R. Josselyn and Alanson K. Josselyn jointly and severally assume and agree to pay at maturity, as a part of the consideration named in this deed of conveyance."

The Josselyns failed to pay the first note, when it became

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due, which they had thus assumed to pay. Edwards thereupon paid it, and by that means came into the possession of it.

Edwards then commenced suit against the Josselyns, to recover the amount thus paid in taking up the note, and for the foreclosure of the mortgage given to secure it and the other notes.

Thompson and several others were made codefendants, to answer as to their supposed interests in the mortgaged premises. All except the Josselyns, however, either made default or disclaimed any interest in the suit.

The Josselyns answered :

First. The general denial ;

Second. That, at the maturity of the note which the said Josselyns had so failed to pay, it was paid by Edwards, and Thompson had entered satisfaction of the mortgage as to that note, and had assigned the remainder of said notes to one David J. Pierce, who then held the entire interest therein ; and,

Third. That the lands sold by the said Edwards to the said Josselyns had been platted, but the plat had not been recorded ; that, at the time of the negotiation for the purchase of said lands by the Josselyns, Edwards delivered to them said plat, which showed a division thereof into a large number of lots, and what purported to be the superficial area of each of said lots, indicated by figures on the face of each lot, and which figures Edwards represented did show the exact superficial area of each lot ; that, relying on said representations, and believing the same to be true, they, the said Josselyns, agreed to give the said Edwards the sum of forty-five thousand two hundred and seventy dollars for the entire tract of land, which amount was arrived at by estimating the land at one thousand three hundred and thirty-two dollars per acre, as the superficial area appeared by taking the aggregate of the areas of the several lots upon said plat ; that, as a part of said sum above named as the agreed purchase-money, they, the said Josselyns, were to

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pay said notes of Edwards to Thompson; that after the execution and delivery of said notes and mortgage for the remainder of the purchase-money, and after the acceptance of the deed from said Edwards, they, the said Josselyns, had a survey of the grounds made, and it was discovered that the areas of the said several lots had not been correctly stated, and that the entire tract fell short of what was thus represented, to the extent of one acre and a half. Therefore the consideration for their undertaking with said Edwards had failed to the amount of two thousand one hundred dollars, which amount they, said Josselyns, then offered to set off against any amount which might be found due the said Edwards herein.

Edwards demurred to the third paragraph of the answer, and his demurrer was sustained by the court, to which the Josselyns excepted.

Issue being joined, the cause was submitted to the court for trial. The court made a special finding of the facts, which was in substantial accordance with the allegations of the complaint.

As a conclusion of law from said facts, the court further found that there was due and owing to said Edwards, as principal and interest on the promissory note so taken up and paid by him, the sum of four thousand one hundred and sixty-eight dollars and twenty-eight cents, and the further sum of one hundred and seventy-five dollars attorney fees, as stipulated to be paid by said note, making in all the sum of four thousand three hundred and forty-three dollars and twenty-eight cents.

A motion for a new trial was submitted and overruled, and exceptions to the overruling of that motion, as well as to the conclusions of law at which the court had arrived, were reserved.

The court then rendered judgment against the Josselyns for the amount thus found to be due and owing to Edwards, to be collected without relief from valuation laws. Also, decreed a foreclosure of the mortgage and

ordered a portion of the mortgaged premises, estimated to be sufficient for that purpose, to be sold to satisfy said judgment.

The cause was appealed to the general term of the court below, and the judgment was there, in all things, affirmed.

It is insisted here, that the court below erred in sustaining the demurrer to the third paragraph of the answer of the Josselyns.

The complaint showed that the Josselyns purchased the land by well-defined boundaries, and without any specification in the deed to them of the quantity of acres it contained. The deed from Thompson to Edwards, and the mortgage from Edwards to Thompson, of which, according to the averments of the complaint, the Josselyns had full notice, both disclaim the specific designation of any given number of acres, in describing the land. We think it is not a sufficient answer to the complaint in this case to allege, that, during the negotiation for the purchase of the land, certain representations were made, not embraced in the deed, as to the number of acres it contained, which proved to be untrue, unless it be also shown that such representations were made fraudulently, and with the intention of deceiving the purchasers. For aught that appears in this third paragraph, Edwards may have been honestly mistaken in the representations he is alleged to have made as to the superficial area of the land, and, on that theory, the Josselyns were without remedy, as they had accepted a deed without any stipulation as to the quantity of land they had purchased. In our opinion, the paragraph was bad on demurrer.

It is also insisted here, that the action in this case was not properly based on the note which the Josselyns made default in paying, and, hence, that the court erred in rendering judgment without relief from valuation laws, and in allowing a sum of money for attorney fees for the collection of the note.

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The Josselyns assumed to pay the notes of Edwards to Thompson at maturity, "together with the interest accrued and to accrue thereon, and in accordance with the terms thereof."

Under that stipulation, Thompson would have had the right to have proceeded against the Josselyns in default of the payment of the note in question, for its collection. Had he thus proceeded, we presume it will not be questioned that he would have been entitled to a judgment against them without relief from valuation laws, and for five per cent. as attorney fees, additional to the amount due for principal and interest. It inevitably follows, that whatever Thompson might have recovered of Edwards on the note and mortgage, could have been recovered by him from the Josselyns, under their contract with Edwards. While Edwards was not in any way relieved of his obligation to pay the note to Thompson by his contract with the Josselyns, yet, under the contract, they, the Josselyns, became in equity the principal debtors, and he only their surety, as between themselves. The Josselyns having failed to pay the note, and Edwards having paid it and taken it up, the latter became subrogated to all the rights of Thompson in the debt of which the note furnished the evidence, and in whatever security existed for the payment of the note, and became in equity entitled to whatever judgment against the Josselyns that Thompson would have been, if Edwards had not paid the note. See *Marsh v. Pike*, 10 Paige, 595; *Ferris v. Crawford*, 2 Den. 595; *Cherry v. Monro*, 2 Barb. Ch. 618; *Cornell v. Prescott*, 2 Barb. 16.

In this view of the case, we think the court did not err in rendering judgment collectible without relief from valuation laws, nor in including an allowance for attorney fees in the judgment.

Other questions were presented by the assignment of errors in the general term of the court below, but as they

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are not insisted upon in this court, we are not required to consider them.

We see no error in the record.

The judgment is affirmed, with costs.

DOMAN ET AL. v. BEDUNNAH.

PLEADING.—*Action for False Return by Sheriff.—Widow.—Decedents' Estates.—Motion in Arrest.—Motion to Make more Certain.—Practice.*—Complaint by the widow of a testator, against a sheriff and his deputy, alleging that such deputy had collected a certain sum of money, which by law belonged to her as widow, on an execution against a third person in favor of the executor of her husband's estate, and that such deputy, having fraudulently forged her name to a pretended receipt on such execution for such money, had unlawfully returned such execution to the clerk's office without having paid her such money.

Held, on motion in arrest of judgment, that the complaint is sufficient after verdict.

Held, also, that, to have reached defects in the complaint, as to the averments of ownership, a motion to cause it to be made more certain should have been made before issue was joined.

From the Dearborn Circuit Court.

F. Adkinson and *G. M. Roberts*, for appellants.

H. D. McMullen, for appellee.

PERKINS, C. J.—Cynthia A. Bedunnah, the appellee, sued Frank R. Doman and James D. English, appellants, upon the following complaint:

"The plaintiff, Cynthia A. Bedunnah, complains of Frank R. Doman and James D. English, and says, that heretofore, to wit, on the 20th day of July, 1871, said Doman was the sheriff of Dearborn county, Indiana, and that said English was his deputy, and that on the 21st day of July, 1871, there was issued out of the clerk's office of the Dearborn Common Pleas Court, an execution against Ira Kimball, Levin Pritchard and Ralph Smith,

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trustees, etc., and in favor of Joseph W. Bedunnah, executor of the will of Ebenezer Bedunnah, deceased; and that said execution was delivered to said defendant Doman, and by him delivered to said defendant English, as his deputy; and that said defendants collected on said execution the sum of ninety-nine dollars and sixty-six cents, and on the 1st day of November, 1872, returned said execution to said clerk's office, with a pretended receipt of this plaintiff for said sum of money; and the plaintiff says, that she is the widow of said Ebenezer Bedunnah, and entitled by law to receive said money so collected, and that she has at no time received the same, or any part thereof, nor executed a receipt therefor; wherefore she prays judgment for one hundred and fifty dollars," etc.

The defendants answered the general denial and payment. Reply in denial of payment.

Trial by jury; verdict for the plaintiff; motion for a new trial overruled, as was a motion in arrest of judgment; and there was final judgment upon the verdict.

Appeal to this court.

The evidence is not in the record.

The ground of the motion in arrest was, that the complaint contained no cause of action in favor of the plaintiff; and the overruling of that motion is assigned for error here.

If a motion to make the complaint more certain had been made, it should have been sustained.

But no objection to the complaint was taken, nor was a demurrer interposed to it; and the question is, is the complaint good after verdict? It alleges that the money which the plaintiff seeks to recover was originally due to the estate of Ebenezer Bedunnah; that she is the widow of said Ebenezer, and is entitled to the money; that the defendants have received it, and, in effect, admitted that it belongs to the plaintiff, by fabricating a receipt acknowledging its payment to her by the defendants. The

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money might belong to the plaintiff. She avers that it does, but does not state the facts out of which her right arises. We think, after verdict, the facts stated, presumptively showing the admission of her title by the defendants, make the complaint sufficient on motion in arrest.

Judgment affirmed, with costs.

SPENCER v. CURTIS.

SUPREME COURT.—Judicial Notice.—Circuit Court.—Terms of.—The Supreme Court, on appeal, takes judicial notice of the terms of the circuit courts, and of their duration.

ARBITRATION AND UMPIRAGE.—Notice.—Waiver.—Where, by agreement and order, an arbitration is directed to take place at a time less than ten days after the date of such agreement and order, the parties thereby waive their right to the notice required by section 4 of the "act relative to arbitrations," etc. 2 R. S. 1876, p. 317.

SAME.—Copy of Award.—Where such submission is made within less than fifteen days of the end of the term of court of which it is agreed that the award shall be made a rule, the parties are presumed to waive their rights to copies of the award, required by section 11 of such act.

SAME.—Arbitration Continued Beyond Term.—Sealing up Award.—Rule.—Where, in consequence of the fact that the term of court at which the award is to be made a rule is about to expire before the completion of the arbitration, it is agreed by the parties that such arbitration shall be continued until an award is made, which shall be sealed up and retained by the arbitrators until the next term of court, the parties thereby waived their rights to copies of the award, required by such section 11, and dispensed with the service of the rule required by sections 13, 14 and 15.

SAME.—Objection to Award.—Affidavit.—Practice.—An alleged objection to an award by arbitrators, which does not appear on its face, must be supported by affidavit.

SAME.—An objection to an award, that the arbitrators imperfectly executed their trust, or did not decide all matters referred to them, must particularly specify the matters thereby intended, where the same do not appear on the face of the award.

SAME.—Award by Majority.—An award duly made by a majority of legally

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appointed arbitrators is valid, unless by the terms of the submission an award by all is required.

SAME.—*Trial by Jury.*—After the submission of a cause for arbitration, and the return of the award, a party to such submission can not demand a trial by jury.

From the Jennings Circuit Court.

G. Swarthout, E. P. Ferris, H. W. Harrington and A. G. Howe, for appellant.

D. Overmyer, J. D. New and T. C. Batchelor, for appellee.

Howk, J.—At the March term, 1875, of the court below, three separate actions were there pending and undetermined, in each of which the parties to this appeal were either plaintiff or defendant. The several actions were entitled as follows :

1. Samuel A. Spencer v. James B. Curtis and Charles B. Curtis;
2. James B. Curtis v. Samuel A. Spencer and Charles B. Curtis; and,
3. Charles B. Curtis v. Samuel A. Spencer.

In the first of these three actions, the plaintiff, Samuel A. Spencer, alleged, in substance, in his complaint, that he and the defendants, James B. and Charles B. Curtis, had been copartners in the business of trading in, buying and selling live-stock, cattle, hogs and sheep ; and, after averring the amount of business done by said copartnership, the plaintiff, Spencer, demanded judgment for an adjustment of their partnership accounts, and for the sum of three thousand dollars, which he claimed was due him from said defendants, on their said partnership transactions.

In the second of said three actions, plaintiff's complaint was in two paragraphs : The first paragraph was a suit on an account, for work done by the plaintiff for the defendants, for money had and received from plaintiff by the defendants for their use, and for property sold and delivered by plaintiff to defendants, and amounting in all

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to three hundred and fifteen dollars and sixty cents, which was then due and wholly unpaid. Wherefore, etc. The second paragraph of said complaint was also a suit on an account for cattle and hogs sold and delivered by plaintiff to said defendants, amounting with interest to four thousand nine hundred and sixty-six dollars and eighty-seven cents, which was then due and unpaid. Wherefore, etc.

And, in the third of said three actions, the plaintiff, Charles B. Curtis, alleged, in substance, in his complaint, that on the — day of March, 1873, he and the defendant, Spencer, formed a partnership to buy, feed and sell stock, and on the — day of February, 1874, they dissolved said partnership by mutual consent; and after averring their partnership transactions, etc., plaintiff demanded judgment for a settlement of their accounts, and for three thousand and seven hundred dollars balance due him, etc. And, in a second paragraph, plaintiff, Charles B. Curtis, alleged, in substance, that the defendant, Samuel A. Spencer, was indebted to the plaintiff in the sum of six hundred and eighty-two dollars on an account for money had and received by defendant for plaintiff's use, and for money laid out and expended by plaintiff for defendant, at his request, a copy of which account was filed with and made part of said paragraph, and was then due and wholly unpaid; and judgment was demanded for seven hundred dollars and all proper relief.

Before the issues were joined in said three actions, all the parties thereto appeared in the court below, at its March term, 1875, and on the 12th day of March, 1875, the following order was made therein, to wit:

"Come now all the parties and agree that the above entitled causes shall be consolidated, and it is so ordered; and now come Smith Vawter, Thomas T. Walker and James W. Hill, arbitrators between said Charles B. Curtis and Samuel A. Spencer, determining differences identical with the subject-matter of said causes, and are duly sworn to faithfully and fairly hear and examine the matters in

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controversy between said Charles B. Curtis and Samuel A. Spencer, and make a just award, according to the best of their understanding. Said arbitrators are hereby ordered to proceed to arbitrate said matter on the 13th day of March, 1875, at eight o'clock A. M., at the office of William B. Hagins, attorney at law and justice of the peace, in the town of Vernon, in said county, and to return their award into open court, at the March term thereof, 1875."

On the same day the agreement of submission to arbitration, between the said parties, was filed in the court below and entered of record; whereby they agreed to submit to the persons named in the above recited order, as arbitrators, all matters in controversy between them, pertaining to all of their business transactions, and that the award of said arbitrators should be a rule and order of the court below, at its March term, 1875, and be made payable without relief from valuation or appraisement laws. And said agreement provided for the time and place of the meeting of said arbitrators, as in said order of the court, and afterward upon their own adjournments and until their labors were completed. This agreement was dated March 10th, 1875, and signed "S. A. Spencer," and "C. B. Curtis."

Afterward, at the May term, 1875, of the court below, the parties appeared, and the arbitrators also appeared and filed their report. We will set out so much of this report or award as we think necessary to the proper understanding, and the correct decision, of the consolidated cause. After reciting the said order of the court below, under which the arbitrators acted, said report proceeded as follows:

"And whereas said arbitrators did, on the 13th day of March, 1875, at the office of Wm. B. Hagins as aforesaid, proceed to arbitrate and hear evidence on the subject-matter in controversy between said parties in said causes, and continued so to do, adjourning from day to day for

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that purpose, until the term of court was about to expire before said arbitrators had half completed the taking and hearing the evidence of said parties in regard to the subject-matter of controversy between said parties, in said causes of action. Whereupon said parties agreed that said arbitrators should proceed and continue the taking and hearing of the evidence, to be given by said parties, in regard to the subject-matter in controversy, in said causes submitted to them, and upon which it was ordered by said court they should arbitrate, and that they adjourn from day to day to meet on their own adjournments, until they had completed their labor in said arbitration, and, when completed, said arbitrators, or any two of them, should make and seal up their award, and, on the first day of the next term of said court thereafter, should file said award in court so sealed up; and said parties to said controversy made bonds and agreements in writing to that effect. And said arbitrators, after continuing from day to day to hear and receive the evidence of said parties, in regard to the subject-matter in controversy in said causes, and having duly considered the same; Therefore Smith Vawter and James W. Hill, two and a majority of said arbitrators, do make and publish the following as their award between said parties, in regard to the subject-matter in controversy in said causes between said parties, to wit: That said Samuel A. Spencer pay to the said Charles B. Curtis the sum of six hundred and fifty dollars, without relit from valuation or appraisement laws, and that the costs of this arbitration * * * be paid equally by said parties."

This award was signed by said two arbitrators, Vawter and Hill, on the 24th day of May, 1873, and was attested by two subscribing witnesses.

To this report or award, the appellant excepted in writing; and these exceptions were overruled by the court below, and to this decision appellant excepted. On ap-

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pellee's motion, judgment was rendered by the court below, in favor of appellee and against the appellant, in accordance with the terms of said report or award. Appellant's exceptions to said report or award, and the decision of the court below thereon, are in the record by a proper bill of exceptions.

In this court, the appellant has assigned seven alleged errors of the court below; but, in his argument of this cause, the appellant has expressly waived the first three, and therefore we need to consider only the last four of these alleged errors. The last four of these alleged errors are assigned as follows:

"Fourth. Because the court below erred, in refusing to reject and set aside the award or report, for the reason that no notice had been served, in any way, upon the plaintiff or appellant, and for the reason that no copy of the award was served upon any of the parties to the arbitration at any time.

"Fifth. Because the court below erred, in permitting the award to go upon the record of the court, without any notice whatever to the appellant.

"Sixth. Because the court below erred, in overruling the objections and exceptions of the appellant to the award of the arbitrators herein, and refusing appellant a jury trial herein.

"Seventh. Because the court below erred, in overruling the objections and exceptions to the report of the referees herein, and refusing a jury trial herein."

The real and only controversy between the parties to this appeal, in this court, relates to the character of the proceedings had, in the consolidated cause, in and out of the court, which finally resulted in the judgment of the court below from which the appellant has appealed to this court. Was there an arbitration of the consolidated cause, under the provisions of the statute of this State, entitled "An act relative to arbitrations and umpirages," approved February 3d, 1852? 2 R. S. 1876, p. 317. Or was there

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a trial by referees of the consolidated cause, under the provisions of sections 349, 350 and 351 of the practice act? 2 R. S. 1876, p. 178.

The appellant insists, that there was merely a statutory arbitration of the consolidated cause; and that far forth we think that his view of the case is correct. But the appellant goes farther, and insists, that, as the record fails to show that a copy of the award was delivered to each of the parties as required by section 11 of the arbitration act, before referred to, the award was void, and that no valid judgment could be rendered thereon. In this latter position, under the peculiar facts and circumstances of this case, we are not inclined to concur.

It would seem to be clear from the agreement of the parties, and from the order of the court below made thereon, and from the terms used in both the order and agreement, that the parties and the court contemplated a statutory arbitration and award to be made by the parties named as arbitrators, as to the matters in controversy in the consolidated cause; and that the award, when made, should be a rule and order of the court below. But it is manifest, we think, that the parties and, with their consent, the court below intended to, and did, waive some of the formalities and requirements of the statute in relation to such arbitrations.

We take judicial notice of the terms of the court below, and of the duration of each term. And, therefore, we know that the March term, 1875, of that court began on the 1st day, and ended on the 20th day, of the month of March.

In this case, the agreement of submission to arbitration was dated March 10th, 1875, and provided that the arbitrators should commence the hearing of the cause on the 18th day of the same month; and the order of the court below thereon, of the 12th day of that month, contained the same provision. It is evident, therefore, that both the parties and the court intended to, and did, waive the "ten

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days' written notice" provided for in the 4th section of the arbitration act. 2 R. S. 1876, p. 318.

It was provided also, both in the agreement of submission and the order of the court below thereon, that the award of said arbitrators should be returned into said court at its March term, 1875. As that term of said court expired by limitation of law on the 20th day of March, 1875, it can not be doubted that both of the parties intended to, and did, waive the delivery of a true copy of the award within fifteen days after the signing thereof, as provided for in the 11th section of said arbitration act. 2 R. S. 1876, p. 320.

From the award of the arbitrators, before set out, it appears, that, at the expiration of the March term, 1875, of the court below, they, the arbitrators, had not half completed the hearing of said cause. On the last day of said term, to wit, March 20th, 1875, the parties executed an additional agreement, wherein it was provided that said arbitrators might continue and complete their labors as soon as convenient, and adjourn at their option, and that the award of said arbitrators should be made a rule and order of the court below at its May term, 1875, and that said arbitrators should seal up their award, when completed, and retain it until the first day of said term of said court. It is clear, we think, from this additional agreement, that the parties, and each of them, intended to, and did, waive the delivery of a true copy of the award, within fifteen days after the signing thereof, as provided for in said 11th section of said arbitration act. Ordinarily, the delivery of such a copy of the award within the time limited in said 11th section is necessary to the validity of the award.

Each of the parties to an award has a personal right to have a true copy of the award delivered to him within the time limited by law, but this is a right which the parties, or either of them, may waive, if they, or either of them, may see proper to do so. And where, as in the case at bar, the terms of the agreement of submission to arbi-

tration are of such a character as to be inconsistent with the delivery of copies of the award to the parties, it may be held, as we hold in this case, that the parties to such agreement have waived their rights to the delivery of such copies.

It seems to us, also, that the stipulations in this additional agreement, that the award of the arbitrators should be made a rule of the court below at its May term, 1875, and that the arbitrators should seal up and retain said award until the first day of said May term, taken in connection with the fact that the action wherein the award was made was then and there pending, dispensed with the necessity for the service of any rule on the appellant, as required by the 13th, 14th and 15th sections of said arbitration act.

What we have said disposes of the fourth and fifth alleged errors assigned by the appellant.

The sixth alleged error was the overruling by the court below of appellant's objections and exceptions to the award of the arbitrators.

The 16th section of the arbitration act specifies the grounds upon which a party may resist the rendition of a judgment upon an award, as follows:

"First. That such award or umpirage was obtained by fraud, corruption, partiality, or other undue means; or that there was evident partiality or corruption in the arbitrators or any of them.

"Second. That the arbitrator or arbitrators [was or] were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence material and pertinent to the controversy, or any other misbehavior by which the rights of any party shall have been prejudiced.

"Third. That the arbitrator or arbitrators exceed his or their powers, or that he or they so imperfectly executed them that a mutual, final, and definite award on the

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subject-matter submitted was not made." 2 R. S. 1876, p. 322.

We will consider the appellant's objections to the rendition of a judgment on the award in this case, in their enumerated order :

"1st. Because the referees exceeded their powers in giving Charles B. Curtis a credit on account of James B. Curtis, against plaintiff, in the sum of one thousand four hundred and two dollars and seven cents."

This objection, if it had any foundation in fact, did not appear in the award or report of the arbitrators; and, therefore, it should have been supported by some evidence of its truth, by an affidavit showing the fact, or at least by an offer to prove the fact before the court. As it is, it is merely a declaration by the appellant, or by his counsel, of an alleged fact which did not appear, and which the appellant did not prove nor offer to prove, so far as the record shows. In our opinion, the court below did not err, in overruling this unsupported objection.

"2d. Because the referees imperfectly executed their trust, and did not decide all matters referred to them, so that a final and definite award was not made on all matters submitted to them."

This objection was too vague and uncertain for any purpose. It did not appear on the face of the report or award, that the referees had imperfectly executed their trust, nor that they had not decided all matters submitted to them. Therefore, if this objection really existed, the appellant should have pointed out specifically what matters the referees had failed to decide. No error was committed by the court below, in overruling this objection.

"3d. Because, on the pleadings, the plaintiff is entitled to a judgment for costs."

We fail to see the point of this objection, if such it can be called, to the award; and the appellant has failed to enlighten us. If the appellant was entitled to any judgment on the pleadings, why should it be limited to a

judgment for costs? We don't know, and the appellant has not informed us. This objection was correctly overruled.

Several other objections were made to the award, which it would be unprofitable, in our opinion, to set out and notice especially. Among other objections to the award, it was said that it was void, because it was not made, and concurred in, and signed, by all the arbitrators. It was not objected, that all three of the arbitrators did not meet and hear the cause, but the objection was, that the award was not the award of all the arbitrators.

By section 8 of the arbitration act, it is provided, that "the award of a majority is valid, unless otherwise required by the submission." 2 R. S. 1876, p. 319. There was nothing in the submission of this cause which can be fairly construed into a requirement that the award to be made should be concurred in by all the arbitrators.

In the case of *Buxton v. Howard*, 38 Ind. 109, the point now under consideration was before this court, and it was then held, WORDEN, C. J., delivering the opinion, that, "Where parties enter upon these statutory arbitrations, they must be understood as having contracted with reference to the statute, and as having agreed that a majority of the arbitrators shall be sufficient to make a valid award, unless the contrary expressly appears." We hold, therefore, that appellant's objection to the award in this case, that it was not made, and concurred in, and signed, by all the arbitrators, was properly overruled by the court below.

Appellant closed his objections to the award or report in this case with a prayer, among other things, that "issues be completed in said cause, and a trial by jury had thereon."

We do not find elsewhere in the record that appellant demanded a trial of this cause by a jury. It is clear to our minds, that appellant, after the submission of this cause to arbitration and the return of the award, was not entitled to a trial of the cause by a jury. Hav-

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ing chosen arbitration as his mode of trial, he must abide by the award of the arbitrators, unless he could show some valid objection to such award.

This question was before this court in the case of *Milner v. Noel*, 43 Ind. 324, and it was then held, that, in cases of arbitration, it was not error to refuse a jury trial. We still adhere to that conclusion.

In our opinion, the court below did not err, in this case, in overruling the appellant's objections and exceptions to the award of the arbitrators, and in rendering judgment on said award.

The judgment of the court below is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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PROMISSORY NOTE.—Check.—Protest.—No protest for non-payment of a check drawn upon a bank is necessary, to render the drawer liable to the payee.

SAME.—Pleading.—Copy of Protest.—The protest of a dishonored check is not a written instrument which can be made the basis of an action, and, in an action by the payee, against the drawer, of such check, a copy of the protest forms no part of the complaint, and can not aid its averments.

SAME.—Action by Payee against Drawer.—Notice of Non-Payment.—If, in such action, the complaint fails to aver that the defendant has been notified of the non-payment of such instrument, or alleges no excuse for the failure to give such notice, it is insufficient on demurrer.

SAME.—Diligence.—Presentment for Payment.—The same rule applies to checks as does to bills of exchange and endorsed promissory notes, in regard to the diligence to be used in presenting them for payment.

SAME.—Failure to Present.—Excuse.—Verbal Agreement not to Present.—A verbal agreement between the payee and the drawer of a check, cotemporaneous with its execution and delivery, that the former will not present it to the drawee for payment until a certain time, is a sufficient excuse for a delay until the time specified in presenting it for payment.

SAME.—Demand and Notice no part of Contract.—Remedy.—Demand for the

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payment of a check, and notice of non-payment of the same, are no part of the contract between the drawer and payee, but are steps in the legal remedy of the latter.

From the Tippecanoe Circuit Court.

B. B. Dailey and *J. R. Coffroth*, for appellant.

J. Applegate and *J. H. Gould*, for appellee.

NIBLACK, J.—This action was originally brought by Robert M. Barkley, in Carroll County, and was based on a check drawn by the appellee on the banking house of Messrs. Lockwood & Company, of New York, requesting them to pay to the order of the said Robert M. Barkley the sum of eleven hundred and seventy-two dollars and fifty cents. The venue was first changed to Cass County and afterward, by agreement, from that county to the Tippecanoe Circuit Court.

During the pendency of the action, the death of the said Barkley was suggested, and the appellant, as his administrator, was substituted as plaintiff.

The complaint was in two paragraphs:

The first paragraph averred due presentment of the check to the drawees for payment, and its dishonor.

The check constituted a part of the complaint, and appears to have been dated at Delphi, Indiana, May 27th, 1869, and to have had no time of payment specified in it.

The second paragraph contained the same averments as the first, with the following additional ones: "And the plaintiff further avers and charges, that, at the time said defendant made and executed the said draft to the said plaintiff, there was a verbal agreement made by and between the said plaintiff and defendant, which was as follows: That, at the time the said defendant executed the said draft, he asked the plaintiff if he desired or wished to use the draft immediately; that the plaintiff told the defendant that he would not want to use the draft until fall, and perhaps not then, as he was going out West to purchase land, and when he found land to suit him he

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would then want to use the draft; that at the time it was agreed to and understood by and between the said plaintiff and defendant, that the said plaintiff should not present said draft immediately to the said Lockwood & Company, but that he should hold on to the same until Fall, or at such time as such plaintiff should desire to use the said draft; as he, the said defendant, would like to have the use of said money until the plaintiff wished to draw the same. That the plaintiff, acting under and by virtue of said agreement and understanding so made with said defendant, did not present said draft until he desired to use said money, and until he purchased said lands, which was in the month of January, 1870, and at that time he presented said draft to the said banking house of Lockwood & Company, where the same was protested for non-payment, of which the said defendant was duly notified."

Demurrers were sustained to both paragraphs of the complaint, and judgment on demurrer was rendered for the appellee.

The sufficiency of the complaint, therefore, is the only question presented for our consideration.

The first paragraph does not state when the check was presented for payment, and, hence, no question of diligence as to the time of its presentation arises in the consideration of that paragraph. It is true, the protest for non-payment, in which is contained a statement when the check was presented, is filed with the complaint, and referred to as a part of it, but it is, nevertheless, not properly a part of the record in the cause, and the matters stated in it can not be used to supply omissions in the averments of the complaint. The action is not founded on the protest, and it is not a written instrument or a copy of one which has to be filed with the complaint, within the meaning of section 78 of our code of civil procedure. See *Wilson v. Vance*, 55 Ind. 584.

A protest of a check is not necessary in case of its non-

payment, but if it were necessary it would only afford evidence of the matters properly embraced within it, and would not constitute the foundation of the action. A protest, in other words, is only to be used as evidence on the trial concerning the instrument in writing to which it relates, and not as a written instrument constituting the basis of the action.

The first paragraph does not allege that the appellee had notice of the non-payment of the check, nor does it show any excuse for not having given him such notice. That omission we regard as fatal to the sufficiency of the paragraph.

It has been decided by this court, that in an action by the holder of a check against the drawer, when payment has been refused, the complaint must show that notice was given of the non-payment of the check, or aver a legal excuse for not giving such notice. See *Griffin v. Kemp*, 46 Ind. 172.

The second paragraph of the complaint presents a question of much greater difficulty, and as to which there seems to be considerable conflict between many of the authorities respectively cited by the parties, and otherwise brought to our attention. Notice of the non-payment of the check is averred, and a certain alleged cotemporaneous and verbal agreement between the parties is set up as an excuse for the long delay in presenting the check for payment. Whether the matters thus set up as an excuse for that delay are sufficient to justify and excuse it, is the real question presented by the second paragraph.

The same rule applies substantially to checks as does to bills of exchange and indorsed promissory notes, as to the diligence to be used in presenting them for payment. They must all be presented within a reasonable time, to charge the drawer or indorser, and what is reasonable time depends to a very great extent upon the circumstances of each particular case, and the relations

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which the parties sustain to each other. See *Edwards Bills & Prom. Notes*, pages 57, 389, 390 and 391.

In discussing the rule, however, above laid down, which we regard as one well sustained by authority as a general rule, *Daniel on Negotiable Instruments* (see vol. 1, p. 449,) says: "Some of the text writers treat of bills, promissory notes, bankers' cash notes, and checks, as falling within one rule; and a failure to discriminate between these various classes of commercial paper has confused the decisions upon the subject, and left them in a state of contrariety and antagonism which it is impossible to reconcile."

In *Seaver v. Lincoln*, 21 Pick. 267, SHAW, C. J., said, in respect to the time within which it is necessary to present for payment a note payable on demand, in order to charge an indorser, that "It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another."

Notwithstanding this contrariety and antagonism between many of the text writers, and notwithstanding the conflicting nature of a large class of reported cases on the subject, certain general rules, as to what constitutes due diligence in presenting the various classes of commercial paper for payment, have been laid down and are now generally recognized. These rules are usually of easy application, and it is only in exceptional cases that the greatest difficulty is experienced.

In most cases, this question of due diligence is one of mixed law and fact, and when the facts are ascertained it is for the court to declare the law upon them. When it arises on a demurrer to a pleading, it is for the court to apply the law to the facts as they are alleged.

The facts, as they are presented in the paragraph before us, make the case an exceptional one, and as such we must consider and decide upon it.

We understand the appellee to concede substantially,

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through his counsel, that, if the alleged cotemporaneous agreement for the extension of the time for the presentation of the check sued on was a valid agreement, it, as pleaded, constituted a sufficient excuse for the delay in presenting such check for payment, but to contend, that, as it was a cotemporaneous and merely verbal agreement, it was not binding on the parties to it, and can not be made effective in any way to modify, extend or enlarge the appellee's risk or liability as the drawer of said check; that to allow it to have the effect claimed for it by the appellant, would be to permit a cotemporaneous verbal agreement to vary and control the terms of a written instrument. In that position, the appellee would seem to be sustained by some of the authorities cited by his counsel, in their very able and exhaustive brief.

We are inclined to the opinion, however, that more recent cases, and cases too which are more directly in point than some of those relied upon by the appellee, have adopted a less rigorous rule.

Story in his work on Promissory Notes, 6th ed., p. 170, sec. 148, says: "Sometimes the indorsement contains a written agreement to dispense with any demand upon the maker, or with notice of the dishonor, if the note is not duly paid. In such cases, the indorser will be liable thereon, not only to his immediate indorsee, but to every subsequent holder; for the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement. * * *

"But where the agreement is not on the face of the indorsement, but is merely oral between the indorser and his immediate indorsee, the effect would seem to be limited to the immediate parties; and even here doubts have been entertained whether the evidence is admissible between them, since it has been thought to vary and control the ordinary obligations of an indorsement. These doubts, however, have been overcome in America; and the doctrine is established, that such evidence is admissible."

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See, also, *Story Bills of Exchange*, secs. 317 and 371; *Taunton Bank v. Richardson*, 5 Pick. 436; *Tucker Manuf'g Co. v. Fairbanks*, 98 Mass. 101; *Barclay v. Weaver*, 19 Pa. State, 396.

The case of *Barclay v. Weaver*, just cited, was an action by the endorsee, against the endorser, of a promissory note. A verbal agreement between the parties, at the time of the agreement, was set up by the endorsee to excuse delay in demanding payment of the note. The court, after making a preliminary statement of the facts of the case, said the question presented is, "May a party prove, by oral testimony, that, at the time of the endorsement of a promissory note, it was agreed that the endorser should be absolutely bound for the payment of it, without the usual demand and notice?"

The court then proceeded to say further:

"This was answered in the negative in the court below, on the principle that oral testimony can not be heard to vary the terms of a written contract.

"The error consists in the assumption that the law regards an endorsement as a written contract to pay on condition that the usual demand be made and notice given.

"It is not so. For where the endorser is himself the real debtor, as in the case of accommodation notes and bills; or has taken an assignment of all the property of the maker as security for his endorsement; or where he can have no remedy against the maker; or in the case of the drawer of a bill of exchange, where the drawee is, and during the currency of the bill continues to be, without funds of the drawer; and in many other such cases, demand and notice are not necessary; and these circumstances may be proved by parol testimony. The reason is, that, in such cases, demand and notice can be of no use, and therefore the law does not require them."

After further discussion of the question thus involved, the court conclude as follows:

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"It seems, therefore, that the duty of demand and notice, in order to hold an endorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time, in accordance with the maxim, *quilibet potest renunciare juri pro se introducto*. And certainly, an endorsement is not regarded as a written contract so far as to prevent oral proof that its terms differ from the ordinary contract of endorsement."

The doctrine thus enunciated appears to have been fully recognized in several cases heretofore decided by this court, and to have been accepted for many years as the law in this State. *Nance v. Dunlavy*, 7 Blackf. 172; *Brown v. Robbins*, 1 Ind. 82; *Free v. Kierstead*, 16 Ind. 91; *Lowther v. Share*, 44 Ind. 390.

For reasons already given, we regard the rule above laid down in the case of *Barclay v. Weaver*, *supra*, as equally applicable to checks and bills of exchange.

After a very careful consideration of the question thus presented to us, we are of the opinion, that the second paragraph of the complaint was sufficient, and that the demurrer to it ought not to have been sustained.

The judgment will therefore have to be reversed.

The judgment is reversed, at the costs of the appellee, and the cause remanded, with instructions to overrule the demurrer to the second paragraph of the complaint.

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TRESPASS.—Trove.—*Conversion of Joint Property.*—One who unlawfully takes possession of personal property belonging to joint owners, and converts to his own use, and sells, the interest of either owner, without his consent, is guilty of a tort, and is liable to such owner for the value of such interest.

From the Hendricks Circuit Court.

Collins v. Ayers.

C. C. Nave and C. A. Nave, for appellant.

W. Irvin, for appellee.

PERKINS, C. J.—The appellee sued the appellant upon the following complaint:

“The plaintiff, James Ayers, complains of the defendant, Arthur M. Collins, and says, that heretofore, to wit, on the — day of July, 1875, he, said plaintiff, was the owner of an undivided one-half interest in certain personal property, to wit, a portable steam engine, Mulay saw, and grain separator, one Jason Tomlinson then and there being the owner of the other undivided half, plaintiff then and there having the possession of said property, said undivided one-half interest in the same then and there being of the value of six hundred dollars. And plaintiff further says, that said defendant, on said — day of July, 1875, without the knowledge or consent of him, said plaintiff, wrongfully took possession of said property and converted plaintiff’s interest in said property to his own use, and then and there sold to one John Jones the plaintiff’s undivided one-half interest in said engine, saw and separator aforesaid, and then and there delivered said property to said Jones, said defendant then and there appropriating the proceeds of said sale to his own use, all to the plaintiff’s damage in the sum of six hundred dollars; wherefore plaintiff demands judgment against the defendant for six hundred dollars, and for all proper relief in the premises.”

A demurrer was overruled to this complaint, and exception entered.

Answer and reply.

Trial by jury; verdict for the plaintiff; motion for a new trial overruled, but, as neither the evidence nor instructions nor proceedings at the trial are in the record, no question arises under this ruling.

A motion in arrest was overruled, and judgment rendered on the verdict.

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Appeal to, and assignment of alleged error in, this court.

Counsel for appellant open their argument, in their brief in this court, in these words:

"The only question presented by the record in this case is as to the sufficiency of the complaint." He comes to the conclusion "that it is clearly and unmistakably bad;" that it does not contain a cause of action.

The complaint shows, that the defendant sold an article of property not his own, delivered it to the purchaser, and appropriated the proceeds of the sale to his own use, without the knowledge or consent of the owner. Such sale was a tortious act. The defendant had no authority by law to sell the property. The sale was wrongful, was a conversion of the property, and this action for the conversion—trover at common law—well lies against the tortfeasor. *Mills v. Malott*, 43 Ind. 248.

Had the defendant been a partner, the sale might have been good, and the defendant liable only to account for the proceeds.

The judgment is affirmed, with costs.

MILLER v. THE WILD CAT GRAVEL ROAD CO.

TURNPIKE.—*Articles of Association.*—*Filing Copy of.*—*Action by Company.*—*Practice.*—*Pleading.*—Where the complaint in an action by a turnpike company alleges that a copy of its articles of association has been filed in the office of the recorder of the only county through which it is averred its road passes, an objection, that no such copy has been filed in the recorder's office of another county through which, also, such road passes, must be presented, not by demurrer, but by answer.

SAME.—*Map of Route made part of Articles.*—The line or route of the road of a turnpike company may be described in its articles of association by a map of such road, incorporated in such articles, showing the starting-point, line and terminus of the same.

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SAME.—*Action to Collect Subscription.*—*Representations to Subscribers.*—It is no defence to an action on a subscription of stock to a turnpike company, that the defendant was induced to make such subscription by false and fraudulent representations as to the payment of the same, made to the defendant by the person soliciting his subscription.

SAME.—*Location of Turnpike on Highway.*—*County Commissioners.*—*Pleading.*—To an action to collect the last instalment of such subscription, the defendant answered, that the plaintiff had constructed its road on the line of a public highway, without having obtained the consent of the proper board of county commissioners.

Held, on demurrer, that the answer is insufficient.

PRACTICE.—*New Trial.*—*Objections to Evidence.*—*Supreme Court.*—Objections to the admission of evidence given on the trial of a cause must be accompanied by a statement of the ground of objection, to render the admission of the same available as cause for a new trial, or on appeal to the Supreme Court.

From the Clinton Circuit Court.

H. A. Brouse, S. H. Doyal and P. W. Gard, for appellant.

C. E. Hendry, for appellee.

PERKINS, C. J.—Suit for the balance due upon a subscription of stock to the original articles of association, made before the organization of the corporation.

A demurrer to the complaint was overruled, and exception taken.

The complaint is good, and the demurrer was rightly overruled.

The objection to it is, that it alleges that a copy of the articles of association was duly filed in the office of the recorder of Howard county, Indiana, and does not allege that a copy was filed in any other county, while the statute requires that copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass.

The complaint does not show that the road is to pass through any other county than Howard. We can not say, therefore, on the demurrer to the complaint, that a copy of the articles was not filed in each county through which the road is to pass. If there could be a case in

which the road was to run into several counties, and the fact not appear in the complaint, the omission to record a copy of the articles in a proper county should be shown by answer. In this case, the articles themselves do not show that the road is to pass through any other county than Howard, and hence do not show that a copy of the articles was not filed in each county, etc. But, on the contrary, the articles of association in this case do show that the whole length of the road is in Howard county, and they are made a part of the complaint. They show the fact in this way. The second of the articles of association is this:

"Article 2. The line of the route over, upon and along which said gravel road will run and be constructed, and the places to and from which it is proposed to construct the same, are particularly set forth in exhibit A, embracing plat and field notes, which exhibit is attached hereto and made a part of this article." Then follows a map of the road, being a plat and field notes, showing with minuteness the points of commencement and termination of the road, and its line between them, the section and range east of the meridian line. The said article two of the articles of association then proceeds: "Road begins on the east boundary of the south-west quarter of section thirty-one, township twenty-four north, of range two east, 2 m. and 16.50 chains north of the south-east corner of said quarter section, in Howard county, Indiana; thence as follows, to wit:" giving the route and distance from station to station till it reaches its terminus at Kokomo, in Howard county. See *Turpin v. The Eagle Creek, etc., Gravel Road Co.*, 48 Ind. 45. Said article two then continues, giving the estimated cost of construction, and the estimated cost per mile, the length and width of the road, etc. Then follows article three of the articles of association.

This map, of which we have spoken, is not attached as an exhibit to the articles of association, but is incorporated

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into the body of article two as a part of it, and with a view to illustrating to the mind, through the eye, what could not be so clearly communicated to the mind by words to the ear.

It is contended that this map is not a part of the articles of association, thus leaving them defective in regard to showing the line or route of the road, as required by statute. 1 R. S. 1876, p. 654.

It was a part of the articles; and it seems to us that it made the description of the route of the road much more intelligible than it would have been in the absence of the map. This map being a part of the articles was, of course, recorded with them, thus making a full compliance with the provisions of the statute above referred to.

The defendant answered in four paragraphs:

First. The general denial;

Second and Third. That the defendant made his subscription to the articles before the company was organized into a corporation, and that one Hauck, who induced defendant to subscribe to said articles, made certain representations about the payment of the subscription and the route of the road, etc., which had not proved to be true.

Demurrer to these paragraphs sustained.

These paragraphs of answer were almost precisely like the second and third paragraphs of answer in the case of *Fox v. The Allensville, etc., Turnpike Co.*, 46 Ind. 31. Those paragraphs were held bad. We refer to the opinion of the court in that case for the reasons. They apply with full force to the paragraphs we are considering in this case.

The defendant is chargeable in law with knowledge that Hauck could not bind a company not yet in existence by any representations he might make.

The fourth paragraph of answer alleged, that the company located its road upon the line of a certain public highway, without obtaining the consent of the board of

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commissioners of Howard county, as is provided by the act of May 12th, 1852. 1 R. S. 1876, p. 654, sec. 4.

This corporation was organized in 1869. This suit is for the recovery of the third and last instalment of the defendant's subscription, the previous instalments having, as is presumed, been paid.

The paragraph of answer does not aver that the consent of the proprietors adjoining and along the highway has not been procured, but simply that that of the county commissioners had not been.

The line of the road is less than twelve miles in length. A great amount of stock beyond that required by statute for the organization of the company is shown to have been subscribed, and two-thirds of it probably collected; hence, we may presume that the road is, in whole or in part, constructed; and it is not claimed that the commissioners have made any objection. The defendant has been all the time a member of the corporation, and must have known of the location of the road upon the highway, and has never objected till now.

Under such circumstances, we think the demurrer was rightfully sustained to the fourth paragraph of answer.

We think the probability of the loss of the road by the company, through any action of the board of commissioners, is too remote to sustain any answer of want or failure of consideration, and the delay of the defendant in raising this objection does not commend it to favor.

The overruling of the motion for a new trial is also assigned for error.

Two questions are argued under this assignment:

1. Error of law occurring at the trial in the admission of evidence over the objection of the defendant.

We have carefully read the proceedings in the trial of the cause. The defendant objected generally to more or less of the evidence offered, but in no single instance did he point out the grounds of objection, or any one of them, if such he had. It has been decided often by this court,

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that the admission of evidence over such objections is not such error as can be made available on appeal. *Rains v. Ballow*, 54 Ind. 79.

2. Verdict not sustained by evidence.

The evidence admitted abundantly supported the verdict of the jury.

The judgment is affirmed, with costs.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS R. W. Co. v.
TROXELL.

PLEADING.—*Railroad.—Killing Stock.—Justice of the Peace.*—A complaint against a railroad company for injuring or killing stock, which does not allege that such injury or death was caused by the defendant's locomotive, cars or other carriages, is bad, even in the court of a justice of the peace, on demurrer, motion in arrest or motion to dismiss.

From the Grant Circuit Court.

N. O. Ross, for appellant.

R. W. Bailey and *A. Diltz*, for appellee.

BIDDLE, J.—Complaint by appellee, against appellant, before a justice of the peace, in the following words:

“Now comes the plaintiff and complains of the defendant, and says, that on the 19th day of May, 1875, by her employees and agents, was running a locomotive and train of cars upon a certain railroad, which she operated and controlled, in the county of Grant and State of Indiana, struck, passed over and killed a heifer, the property of plaintiff, of the value of twelve dollars. Plaintiff avers, that, at the time and place where the said animal got upon said road and was so killed, the said road was not securely fenced; wherefore plaintiff demands judgment for fifteen dollars, and all other proper relief.

“2d. For further complaint, plaintiff says, that the de-

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fendant, while running, controlling and operating her said road, on the 19th day of June, 1875, in the county of Grant and State of Indiana, then and there killed a sow, (the same being a female hog,) the property of plaintiff, of the value of twenty dollars. Plaintiff avers, that, at the time and place when and where said sow got upon said road and was so killed, said road was not securely fenced; wherefore plaintiff, by reason of the matters set [forth] in this complaint, asks judgment for thirty-five dollars, and all other proper relief."

Appeal from the judgment of the justice of the peace against the appellant to the circuit court. Motion by appellant in the circuit court to dismiss the case, for want of a sufficient cause of action. Motion overruled; exception. Motion in arrest of judgment overruled; exception. Motion for a new trial overruled; exception. Appeal to this court.

In cases of this kind, under the statute, it is necessary for the plaintiff to allege that the stock was killed or injured by the locomotives, cars or other carriages of the defendant. From the peculiar structure of the first paragraph of this complaint, it is impossible to ascertain what it was, that "struck, passed over, and killed a heifer,"—whether it was the locomotive of the appellant or some other locomotive, or the appellant or some other person.

The verbs "struck" and "passed" have no nominatives; and the allegation that the appellant was running a locomotive on the road can be made plain only by a nominative understood to the verb "was."

With all the liberality extended toward the construction of pleadings before justices of the peace, we can not hold the first paragraph of this complaint sufficient.

The following authorities control our opinion: *The Indianapolis, etc., R. R. Co. v. Brucey*, 21 Ind. 215; *The Toledo and Wabash R. W. Co. v. Lurch*, 23 Ind. 10; *Toledo and Wabash R. W. Co. v. Reed*, 23 Ind. 101; *The Toledo, etc., R. W. Co. v. Weaver*, 34 Ind. 298; *The Indi-*

McCormick *et al.* v. Mitchell.

anapolis, etc., R. R. Co. v. Robinson, 35 Ind. 380; *The Ohio and Mississippi R. W. Co. v. Cole*, 41 Ind. 331; *The Pittsburgh, etc., R. W. Co. v. Hackney*, 53 Ind. 488.

The second paragraph is still more defective than the first. There is no attempt in it to allege that the sow was killed by the locomotive, car or other carriage of the road. Neither paragraph is good under the statute, because neither states that the killing was done by a locomotive, car or other carriage of the road; and neither is good at common law, because neither alleges the negligence of the appellant. See authorities *supra*.

We think the court should have dismissed the cause, on motion of the appellant, unless the appellee chose to amend the complaint, and should have sustained the motion in arrest of judgment.

For these errors, the judgment is reversed, at the costs of the appellee, and the cause remanded for further proceedings.

MCCORMICK ET AL. v. MITCHELL.

PLEADING.—Practice.—Motion in Arrest.—A motion in arrest of judgment for defects in a complaint reaches such only as are not cured by the finding or verdict, nor waived by failure to demur.

SUPREME COURT.—Objections to Evidence.—New Trial.—Where the grounds of objection to the admission of alleged erroneous evidence do not appear by the record, on appeal to the Supreme Court, no question in relation thereto is presented for decision.

CONTRACT.—Joint and Several.—Sale of Chattels.—Interest.—Partial Payments.—Rule.—Liquidated Damages.—A., B. and C. executed to D. a written contract for the sale and delivery to the latter, at a certain time and place, for an agreed price, of a specified quantity and quality of chattels, and containing the following conditions, viz.: "For all moneys advanced on said contract, I agree to pay ten per cent. interest. In case I fail to deliver said" chattels, "according to said contract, I bind myself and sureties to pay" to D. "five hundred dollars damages." D. brought suit

87	248
130	232
87	248
131	407
57	248
133	650

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thereon against A., B. and C., alleging their failure to comply with the contract, to recover for advances made, interest thereon and damages.

Held, that the terms of such contract are clear and definite, and that it is an obligation binding the defendants jointly and severally.

Held, also, that, where a partial payment on an obligation is made, the interest then accrued on the principal must first be discharged, and the remainder only, if any, of such payment shall be credited on the principal; but if such payment be less than the interest then accrued, the principal shall remain on interest until the aggregate payments made shall exceed the accrued interest.

Held, also, that, upon failure of the defendants to deliver the chattels contracted for, the plaintiff was entitled to recover for advances made and interest thereon, and for the whole five hundred dollars as liquidated damages.

From the Daviess Circuit Court.

J. W. Burton and J. W. Ogdon, for appellants.

J. H. O'Neill and D. J. Hefron, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellants, as defendants, in the court below.

In his complaint, the appellee alleged, in substance, that on the 29th day of July, 1868, the appellants, by their written agreement, a copy of which was filed with and made part of said complaint, sold, and agreed to sell, to appellee, three hundred head of good corn-fed hogs, spade sows, and barrows, to average two hundred and fifty pounds gross, to be delivered in Cincinnati, Ohio, from the 15th to the 20th days of December then next ensuing, at the cash price for such hogs on the day of delivery, and agreed to pay back to appellee all money advanced by him on said contract, with ten per cent. interest thereon, and in case of failure to deliver said hogs, according to said contract, to pay the appellee the sum of five hundred dollars as liquidated damages; that, at the time of the execution of said written contract, the appellee paid and advanced to Eli C. Hornady, one of the defendants, the sum of five hundred dollars on said contract; that on the 16th day of August, 1868, the appellee paid and advanced the further sum of one thousand two hundred and fifty dollars; that

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on the 3d day of September, 1868, appellee paid and advanced the further sum of one thousand and sixty-two dollars and fifty cents; that on the 21st day of September, 1868, appellee paid and advanced the further sum of five hundred and sixty-two dollars and fifty cents; that the defendants did not, nor did either of them, ever deliver said hogs, or any portion thereof, but wholly failed so to do; that said defendants never returned and paid back said money so advanced, or any part thereof, and never paid said five hundred dollars damages, or any part thereof, but have wholly failed so to do; and that, by reason of said facts and statements, the defendants had become and were indebted to the appellee in the sum of five thousand dollars, for moneys advanced, damages and interest. Wherefore, etc.

The written agreement, of which a copy was filed with and made a part of appellee's complaint, reads as follows:

"I have this day sold unto Jesse A. Mitchell (300) three hundred good corn-fed hogs, spade sows, and barrows, to average two hundred and fifty (250) pounds gross, to be delivered in Cincinnati from the fifteenth to the twentieth days of Dec. next, at the cash price for such hogs on the day of delivery. For all moneys advanced on said contract, I agree to pay ten per cent. interest. In case I fail to deliver said hogs according to said contract, I bind myself and sureties to pay said Mitchell five hundred dollars damages. (Signed) E. C. HORNADY,

"July 29th, 1868.

I. W. McCORMICK,

[Five cent revenue stamp.]

"S. W. SMITH."

To appellee's complaint, the defendants jointly answered by a general denial and two affirmative paragraphs, and the appellants filed an additional affirmative paragraph of answer. As no questions of law were or are presented on either of the affirmative paragraphs of answer, we need not specially notice them. The appellee replied to each and all of these affirmative paragraphs, by a general denial.

The issues joined were tried by the court below, without a jury; which trial resulted in a finding for the appellee, and assessing his damages in the sum of two thousand three hundred and seventy-two dollars.

On written causes filed, the appellants moved the court below for a new trial, which motion was overruled, and the appellants excepted to this decision. And the appellants then moved the court in arrest of judgment, which motion was also overruled, and the appellants excepted. And judgment was rendered by the court below on its finding, from which judgment this appeal is now prosecuted.

The appellants have assigned, in this court, the following alleged errors of the court below :

- 1st. In overruling their motion for a new trial; and,
- 2d. In overruling their motion in arrest of judgment.

We will consider and decide the questions presented by these alleged errors in the inverse order of their assignment.

The motion in arrest of judgment, in this case, would reach only such defects in appellee's complaint as were not cured by the finding, nor waived by the appellants' failure to demur to said complaint. *Adamson v. Rose*, 30 Ind. 380; *Waugh v. Waugh*, 47 Ind. 580; *Gander v. The State, ex rel., etc.*, 50 Ind. 539; *Spahr v. Nicklaus*, 51 Ind. 221; *The Toledo, etc., Railway Co. v. Milligan*, 52 Ind. 505; and *Harris v. Rivers*, 53 Ind. 216. The motion in arrest of judgment points out no objection to appellee's complaint; and we have found it difficult to ascertain what the appellants' objections were to the complaint. It is said in argument by appellants' learned attorneys, that "the instrument sued on is of too vague and indefinite a character, to bind the appellants."

It seems to us, however, that the instrument sued on is not open to this objection. There is neither vagueness nor uncertainty in said instrument, and its terms are so clear and definite that they could not

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well be misapprehended. On its face, the instrument is the joint and several contract of the subscribers thereto; whereby they sold the appellee a certain number of hogs, of a certain average weight, for delivery at a certain time and place, at the cash price for such hogs at the time of delivery. In addition thereto, the subscribers agreed, that the appellee should be paid a certain rate of interest on all moneys advanced by him on said contract, and, in the event of the non-delivery of said hogs according to said contract, they further agreed to pay the appellee five hundred dollars damages. It cannot be doubted, we think, that the appellee's complaint stated a good cause of action against the appellants; and, this being so, we know of no other objections to the complaint, if any exist, which could be reached by the motion in arrest of judgment. Our conclusion is, that the court below committed no error, in overruling appellants' motion in arrest of judgment.

In their motion for a new trial, the appellants assigned the following causes therefor:

1. That the decision of the court was not sustained by sufficient evidence;
2. Because the decision of the court was contrary to law;
3. Because of error of the court in the assessment of the amount of recovery, in favor of the appellee and against the appellants, the amount so assessed being too large;
4. Because the damages are excessive; and,
5. Because of error of law occurring at the trial and excepted to at the time, in this, that the court admitted in evidence, over the appellants' objection, the written contract sued upon, a copy of which had been filed with, and made part of, appellee's complaint.

A bill of exceptions, containing the evidence on the trial of this cause in the court below, is properly in the record.

When the appellee, on the trial, offered in evidence the written contract sued upon, the bill of exceptions contains this statement in reference thereto:

"To which the defendants Samuel M. Smith and Isaac W. McCormick, by their attorneys, objected, which objection was by the court overruled, and the plaintiff was permitted, over said objection, to read said written instrument in evidence, to which ruling of the court the said defendants, Smith and McCormick, by their attorneys, at the time excepted."

It will be seen from this statement, that the record of this cause wholly fails to show the grounds of appellants' objection to the admission in evidence of the written contract sued upon. It does not appear that the appellants pointed out or stated to the court below the grounds of their objection to the admission in evidence of said written contract.

In such a case, the rule is well settled, that this court will not, on appeal, consider the question of the admissibility of the evidence, nor any objections here to its admission. *Bishplinghoff v. Bauer*, 52 Ind. 519; *Rosenbaum v. Schmidt*, 54 Ind. 231; *Bishop v. Welch*, 54 Ind. 527.

In our opinion, this rule of practice is wise and reasonable; and, adhering thereto in this case, we can not consider the alleged error of law complained of by the appellants in their fifth cause for a new trial.

The appellants also insist that the court below erred in its assessment of the amount of recovery. In our view of this matter, the amount of the appellee's recovery in this case is a question of fact and figures, rather than of law. There is no conflict in the evidence in regard to the dates and amounts of the advances made by the appellee on the contract in suit; nor in regard to the non-fulfilment of said contract, by the failure to deliver to the appellee any of the hogs, at the time and place mentioned in said contract; nor in regard to the dates and amounts of the

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several repayments to the appellee, on account of the moneys advanced by him on said contract.

With these facts proven and the written contract in evidence, it seems to us that the error of the court below, in its assessment of the amount of recovery, if there be any error, was in favor of the appellants, and not against them. The rule for the computation of interest, where payments have been made, and for the application of such payments, in this State, was long since established by this court, and has never been departed from. This rule is thus stated: Where a payment is made, the interest then accrued must be first discharged, and the balance only, if any, of such payment shall be credited on the principal; but, if the payment be less than the interest accrued, the principal shall remain on interest until the aggregate payments made shall exceed the accrued interest. *Wasson v. Gould*, 3 Blackf. 18. We state this rule here, for the reason that appellants' learned attorneys seem to have disregarded it in their computation of the amount due the appellee in this case.

It seems to us, that, if the two-fold nature of the contract in suit is borne in mind, there can be no difficulty in arriving at the precise amount due the appellee under said contract. In the event of the failure to deliver the hogs sold at the time and place specified in the written contract, for this breach of the contract, damages, in the agreed sum of five hundred dollars, became due and payable to the appellee under said contract. And these damages would have been so due and payable, as we construe the contract, upon such breach thereof, even if the appellee had made no advances on said contract, or if the advances made thereon had all been repaid. It can not be said, under any fair construction of the contract, that these damages were intended by the parties to be a compensation to the appellee for the use of the moneys advanced by him, in addition to the interest on said moneys stipulated for in said contract. When, therefore, the appel-

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lants impute "usury" to the contract sued upon, it seems to us that they wholly misapprehend the force and effect of the terms of said contract.

We find no error in the assessment of the amount of the appellee's recovery by the court below, of which the appellants can complain.

In our opinion, the court below did not err, in overruling the appellants' motion for a new trial.

The judgment of the court below is affirmed, at the costs of the appellants.

BAKER ET AL. v. THE STATE.

CRIMINAL LAW.—Evidence.—Defendant Discharged Compelled to Testify against Codefendant.—Where two or more defendants are jointly indicted for the same offence, the prosecuting attorney may, by leave of court, dismiss the prosecution as to any one of them, and compel him to testify as a witness against the others.

SAME.—Indictment.—Directors of Turnpike Company.—Failure to Make and Publish Statement.—Where the directors of a turnpike company fail or refuse to cause to be made out and published, a full and complete statement under oath of the financial condition of their company, as required by the act of March 9th, 1875, (1 R. S. 1876, p. 673,) they may be indicted and prosecuted under the second section of such act.

From the Ohio Circuit Court.

H. D. McMullen, W. H. Matthews, F. Adkinson and G. M. Roberts, for appellants.

C. A. Buskirk, Attorney General, for the State.

PERKINS, C. J.—The following indictment was duly placed upon record in the Dearborn Circuit Court:

"The grand jurors of the State of Indiana, in and for the county of Dearborn, good and lawful men, duly and legally empanelled, sworn and charged in the Dearborn Circuit Court, at its February term, A. D. 1877, to inquire

Baker et al. v. The State.

in and for the body of said county, in the name and by the authority of the State of Indiana, upon their oaths, present and charge, that, at and in the county of Dearborn and State of Indiana, one William H. Baker, Zachary T. Baker, Mortimer K. Goodrich, William Hill and Ambrose E. Nowlin were, on the 3d day of January, A. D. 1876, duly selected and qualified as the members of a board of directors of a certain corporation, commonly called and known by the name of 'The Lawrenceburgh and Napoleon Turnpike Company,' a corporation created and organized under a special act of the General Assembly of the State of Indiana, and now conducted and doing the business of said corporation under the general laws of the State of Indiana, defining the rights, powers and duties of turnpike companies, etc., and the officers thereto belonging, and in the corporate name, 'The Lawrenceburgh and Napoleon Turnpike Company,' being located in the said Dearborn county, and State of Indiana; and the directors aforesaid, officers of said corporation, reside in said Dearborn county, and State aforesaid; they, the said William H. Baker, Zachary T. Baker, Mortimer K. Goodrich, William Hill and Ambrose E. Nowlin, members of the board of directors of said turnpike company as aforesaid, did then and there, to wit, during the first week of July, A. D. 1876, unlawfully fail, neglect and refuse to make or cause to be made out a full and complete statement of all moneys, rights, credits, property and assets of every kind owned or held by the said turnpike company, together with the amount of its liabilities, also showing the amount of capital stock of said company, and its gross receipts, for the previous years of 1875 and 1876, with the amounts paid out for repairs, for improvements, on account of litigation, on account of its officers and on account of all other expenses, which shall be properly classified, and have said statement sworn to by the members of said board of directors of the said 'Lawrenceburgh and Napoleon Turnpike Company,' and

attested by the clerk or secretary of said company; and did then and there unlawfully fail, neglect and refuse to have said statement published within fifteen days after the first day of July, 1876, in a newspaper of general circulation, printed and published in said Dearborn county, through which county said road runs, and have the same published two consecutive weeks in such newspaper, they, the said William H. Baker, Zachary T. Baker, Mortimer K. Goodrich, William Hill and Ambrose E. Nowlin, being, during all of said time, and still being, members of said board of directors; and that they unlawfully failed, neglected and refused to make or cause to be made out and publish the said report, as required of them as such directors, as aforesaid, until the 24th day of August, A. D. 1876, contrary to the statute in such case made and provided.

GEORGE R. BRUMBLAY,
"Prosecuting Attorney."

This indictment is predicated on the act of March 9th, 1875. 1 R. S. 1876, p. 673.

On application of the defendants, the venue was changed to the county of Ohio.

On arraignment, defendants Baker, Goodrich, Hill and Nowlin pleaded not guilty. A jury was empanelled, and a portion of the evidence heard, when the prosecuting attorney, by leave of the court, entered a *nolle prosequi* as to the defendant Hill, who was discharged, and the trial proceeded to its conclusion, resulting in a verdict of guilty against defendants Baker, Goodrich and Nowlin, and the assessment of a fine of one hundred and sixty-five dollars against each of them.

Hill was discharged by the court, that he might be made a witness in the cause.

A motion for a new trial, specifying the following causes, was filed:

1. The court erred in admitting the testimony of William Hill, and of Jasper Ross;

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2. The court erred in giving certain instructions ;
3. The court erred in refusing certain instructions ;
4. The verdict of the jury is not sustained by the evidence ; and,
5. The verdict is contrary to law.

The motion for a new trial was overruled as to Baker and Goodrich, and granted as to Nowlin, and exception taken by the former.

A motion in arrest followed, on the ground of the insufficiency of the indictment. The motion was overruled, and exception taken. Judgment on the verdict was entered against Baker and Goodrich.

The errors assigned in this court are :

- 1st. The overruling of the motion for a new trial ;
- 2d. The overruling of the motion in arrest of judgment ; and,
- 3d. The overruling of the motion to quash the indictment.

No motion to quash appears in the record ; but the sufficiency of the indictment will be determined upon the motion in arrest.

The court did not err in overruling the motion for a new trial.

The instructions referred to in the motion for a new trial, as having been given and refused, are not in the record.

The verdict is abundantly sustained by the evidence.

The court did not err in admitting the testimony of Hill and Ross. They were competent witnesses. No objection appears to have been interposed to Ross as a witness, or to his testimony ; and Hill was admitted and compelled to testify, strictly in accordance with the terms of section 106, 2 R. S. 1876, p. 401.

The only remaining question is upon the sufficiency of the indictment.

No particular objection to it is pointed out, and we discover none. The statute upon which the indictment

Mitchell v. Ratts.

is based requires the directors of every gravel, turnpike, macadamized or plank road company to do, in the first week in July, just what the directors of the company named in this indictment did not do, and renders them liable to indictment for failure, etc.

The sixty-day rule as to briefs does not apply to criminal cases.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

MITCHELL v. RATTS.

LIQUOR LAW.—*Act of 1875.*—*Section 20.*—*Action by Wife.*—*Pleading.*—*Par. ties.*—*Statute Construed.*—In an action by a wife against a person licensed under the provisions of the act of March 17th, 1875, (1 R. S. 1876, p. 869,) regulating the sale of intoxicating liquors, etc., the complaint alleged that the defendant had sold intoxicating liquor to the plaintiff's husband while he was intoxicated, whereby he became crazed, in consequence of which the plaintiff was injured in her person and means of support.

Held, on demurrer for a defect of parties, that, under section 20 of such act, the wife may maintain such action without joining her husband.

Held, also, on demurrer for want of sufficient facts, that such action may be maintained only when the sale complained of is made in violation of such statute, and that the complaint is sufficient.

From the Washington Circuit Court.

H. Heffren and — *Zaring*, for appellant.

T. L. Collins and *A. B. Collins*, for appellee.

BIDDLE, J.—Complaint, founded on section 20 of the act of March 17th, 1875, (2 R. S. 1876, p. 873,) against Francis Ratts, by Susan Mitchell, alleging that Ratts is a person licensed to sell intoxicating liquor; that he sold intoxicating liquor to John Mitchell, her husband, when he was intoxicated, whereby he became crazed, and that,

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in consequence of his condition, she was injured in her means of support and in her person.

A demurrer, alleging as grounds, 1. That there is a defect of parties, in this, that the husband of said plaintiff should be a co-plaintiff; and, 2. That said complaint does not state facts sufficient to constitute a cause of action, was filed to the complaint, and sustained, to which ruling exceptions were reserved.

The parties stood by their positions, and the court rendered judgment for appellee.

Appeal.

The section upon which this suit is sought to be maintained is in the following words:

"Sec. 20. Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable and also liable on his bond filed in the auditor's office, as required by section 4 of this act, to any person who shall sustain any injury or damage to his person or property, or means of support on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."

This section makes the person who violates its provisions liable "to any person who shall sustain any injury," etc. Any person includes a wife, and, if it includes a wife, it includes her without joining her husband. This is the plain meaning of the words, and any other construction would do violence to their sense; besides, in view of the past legislation upon the subject of intoxicating liquors, we think such was the legislative intention.

The averments in the complaint are sufficient to bring the case within the statute; indeed, as to this, no serious objection is made against it.

The judgment is reversed, at the costs of the appellee, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.

Line v. Huber.

LINE v. HUBER.

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NEW TRIAL.—*Cause.*—*Ruling on Demurrer.*—*Practice.*—Error of the court in its ruling on a demurrer is not cause for a new trial.

SAME.—*Record.*—*Supreme Court.*—*Evidence.*—Where the evidence is not in the record, on appeal to the Supreme Court, no question is presented as to whether the verdict is sustained by the evidence, or is contrary to law.

From the Kosciusko Circuit Court.

J. S. Frazer, R. B. Encell, J. Morris and W. H. Withers,
for appellant.

H. S. Biggs, for appellee.

PERKINS, C. J.—Suit by appellant, against appellee, for slander.

Verdict and judgment for the appellee.

There is but one assignment of error in this court, viz.: that the court below erred, in overruling appellant's motion for a new trial.

The causes for a new trial, specified in the motion, were:

1. The overruling of the demurrer to the second paragraph of answer, and the sustaining of the demurrer to the second paragraph of reply; and,
2. That the verdict was contrary to the law and the evidence.

Error in ruling upon a demurrer is not, in any case, a reason for a new trial. *The Ohio, etc., R. W. Co. v. Hemberger*, 43 Ind. 462.

That the verdict was contrary to the law and the evidence, was good cause for a motion for a new trial; but the court below overruled the motion, for the reason, we may infer, that the cause assigned did not exist; and, as the evidence is not in the record, we can not say the court erred in its ruling.

Judgment affirmed, with costs.

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THE CITY OF CRAWFORDSVILLE v. BRUNDAGE.

SUPREME COURT.—*Practice.*—*Motion to Strike Out.*—The overruling of a motion to strike out part of a pleading is not available as error on appeal to the Supreme Court, where it does not appear from the record that such ruling worked injustice.

MECHANICS' LIENS.—*Personal Liability of Owner to Sub-Contractor.*—*Contract.*—The owner of a building erected under a contract between him and a contractor is not liable to a sub-contractor, in an action by him on account merely, for work and labor done on, and materials furnished for, such building, at the request of the contractor.

SAME.—*Action to Enforce.*—*Pleading.*—A complaint to enforce a mechanic's lien for the value of labor and materials, which does not aver that the labor was done, and the materials furnished, for the building against which the lien is sought, is insufficient.

SAME.—*Notice.*—*When Recorded.*—A notice of intention to hold a mechanic's lien upon a building must be duly recorded within sixty days after the completion of the same.

From the Montgomery Circuit Court.

W. P. Britton and M. W. Bruner, for appellant.

S. C. Willson and L. B. Willson, for appellee.

Howk, J.—In this action, the appellee was the plaintiff, and the appellant and Benjamin Whitsett and Robert Alexander were the defendants, in the court below.

The appellee's complaint was in two paragraphs:

In the first paragraph, the appellee alleged, in substance, that on the — day of —, 1872, the appellant employed the defendants Alexander and Whitsett to erect and finish off, for the appellant, a brick building on part of lot number 110, on the original plat of the town, now city, of Crawfordsville, then owned by and in the possession of the appellant, known as the engine-house and city hall; that the defendants Alexander and Whitsett, in the prosecution of said work, afterward, on the 1st day of October, 1872, became indebted to the appellee in the sum of two hundred and thirty-eight dollars and forty-nine cents, for work and labor on said building, and material

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(stone work) furnished for, and which went into said building, in its construction, of all which a bill of particulars was filed with, and made a part of, said complaint; which indebtedness remained unpaid, except the sum of fifty-five dollars and seventy-five cents, paid by General H. B. Carrington; wherefore the appellee demanded judgment for two hundred dollars, and other proper relief.

In the second paragraph of his complaint, the appellee alleged, in substance, that "on the day and year aforesaid," at the special instance and request of the defendants Alexander and Whitsett, the appellee did do work and labor on, and furnished materials to the amount of two hundred and thirty-eight dollars and forty-nine cents, as shown by said bill of particulars, which work and labor and materials were used by them in the construction of a brick building for the appellant, on land then owned by the appellant, to wit, on part of lot number 110 on the original plat of the town (now city) of Crawfordsville, and that afterward, on the 4th day of February, 1873, the appellee made and filed with the recorder of said county, for record, a written notice of his intention to hold a lien on said premises and said building for one hundred and eighty-two dollars and seventy-four cents, the balance due him for work and labor and the materials so furnished, as shown by said bill of particulars, which notice of lien was made out, filed and recorded within sixty days of the time the appellee was to have been paid for said work and labor and materials, a copy of which notice was filed with, and made part of, said paragraph, of all which the appellant had notice; wherefore the appellee demanded judgment for the foreclosure of his said lien, etc.

The appellant moved the court below, in writing, to strike out part of the second paragraph of the appellee's complaint, which motion was overruled, and the appellant excepted. And the appellant then demurred to each paragraph of the complaint for the want of sufficient facts

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therein to constitute a cause of action against the appellant, which demurrers were overruled, and to these decisions the appellant excepted.

The appellant answered, in two paragraphs, the appellee's complaint, as follows:

First. A general denial; and,

Second. An affirmative defence, to which appellee's demurrer for the want of sufficient facts was sustained, and appellant excepted.

The cause was tried by the court without a jury, and a finding made for the appellee in the sum of one hundred and eighty-two dollars and seventy-four cents, and that he was entitled to a mechanic's lien on the property described in the appellee's complaint.

Appellant's written motion for a new trial having been overruled, and an exception saved to such ruling, judgment was rendered by the court below in accordance with its finding, from which judgment the appellant alone has appealed to this court.

The following alleged errors of the court below have been assigned by the appellant in this court, to wit:

1st. In overruling the appellant's motion to strike out certain parts of the second paragraph of the appellee's complaint;

2d. In overruling the appellant's demurrers to the first and second paragraphs of appellee's complaint;

3d. In sustaining appellee's demurrer to the second paragraph of appellant's answer; and,

4th. In overruling appellant's motion for a new trial.

This court has repeatedly held, that the overruling, by the court below, of a motion to strike out a part of a pleading, is not, on appeal, an available error here. The reason assigned for such decision is, that "At most, it can but leave surplusage in the record, which does not vitiate that which is good." *Mires v. Alley*, 51 Ind. 507. See *House v. McKinney*, 54 Ind. 240. Cases may occur, in which a rigid adherence to these decisions might work hardship

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or injustice; but the case at bar is not one of them. We are satisfied that no harm was done to the appellant, in this case, in overruling its motion to strike out parts of the complaint.

The first paragraph of appellee's complaint does not contain a single averment against the appellant, or the appellant's property. It alleged, that the appellant's co-defendants, Alexander and Whitsett, were indebted to the appellee for work and labor done, and materials furnished, by him under their employment, in the erection of a building on the appellant's real estate; but the appellee did not aver, in his first paragraph, that he had acquired, or attempted to acquire, in any manner, either a claim against the appellant, or a lien on the appellant's property, for the amount of said indebtedness. It needs no argument, therefore, to show that the court below erred, in overruling the appellant's demurrer to the first paragraph of the complaint.

In the second paragraph of his complaint, the appellant claimed that he had acquired a mechanic's lien on the appellant's property, and sought to enforce such lien. It was not alleged, however, in this second paragraph, that the work and labor were done, and the materials furnished, for the appellant's building; but the allegation was: "which work and labor and materials were used" by said Alexander and Whitsett, in the construction of said building. This allegation was clearly insufficient. *The City of Crawfordsville v. Barr*, 45 Ind. 258; *The City of Crawfordsville v. Irwin*, 46 Ind. 488; *The City of Crawfordsville v. Johnson*, 51 Ind. 397; *Hill v. Braden*, 54 Ind. 72; and *Hill v. Ryan*, 54 Ind. 118.

In the 650th section of the practice act, it is provided, that any person wishing to acquire a mechanic's lien on property, whether his claim be due or not, shall file in the recorder's office of the county, "within sixty days after the completion of the building or repairs, notice of his intention," etc. 2 R. S. 1876, p. 268. In the case now

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before us, the averment on this point was, in the second paragraph of appellee's complaint, "which notice of lien was made out, filed and recorded within sixty days of the time the appellee *was to have been paid* for said work and labor and materials." This averment does not show that the notice was filed within sixty days *after the completion* of the building; and, therefore, it was not sufficient. *Sharpe v. Clifford*, 44 Ind. 346; *The City of Crawfordsville v. Barr*, *supra*; and *The City of Crawfordsville v. Irwin*, *supra*.

For the reasons given, it is very clear to our minds that the court below erred, in overruling the appellant's demurrer to the second paragraph of appellee's complaint.

Our conclusions, in regard to the insufficiency of the appellee's complaint, will render it unnecessary for us to consider and decide any of the questions presented by the other alleged errors.

The judgment against the appellant is reversed, at the appellee's costs, and the cause is remanded, with instructions to the court below to sustain the appellant's demurrers to both paragraphs of the complaint, and for further proceedings.

SHRIVER v. BOWEN.

JUDGMENT.—*Set-off*.—A judgment rendered against a defendant who has pleaded a set-off is one, in effect, for the amount of both judgment and set-off.

SUPREME COURT.—*Jurisdiction*.—*Appeal*.—*Action Originating before Justice*.—

Prior to the taking effect of the act of March 14th, 1877, (Acts 1877, Spec. Sess., p. 59,) amending section 550 of the practice act, where set-off was pleaded in an action originating before a justice of the peace, the party against whom judgment was rendered might appeal to the Supreme Court, though such judgment was for less than ten dollars, if the amount of the judgment and his own claim exceeded that sum.

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VENUE, CHANGE OF.—*From Judge, after from County.*—A party to an action is not precluded from taking a change of venue from the judge, by the fact that he has theretofore taken a change from the county.

From the Marshall Circuit Court.

D. Turpie, H. D. Pierce, H. B. Jamison and I. Connor,
for appellant.

M. D. White and LaRue & Everett, for appellee.

PERKINS, C. J.—This suit was commenced before a justice of the peace, on an account as a cause of action, for nine dollars and a half.

The defendant answered by way of set-off, amounting to seventeen dollars, and claimed judgment in his favor against the plaintiff.

Judgment before the justice for the plaintiff.

Appeal to the circuit court. Judgment in that court for the plaintiff for a fraction over eight dollars. This amounted, in effect, to a judgment against the defendant for a little over twenty-five dollars. This gave the Supreme Court jurisdiction at the time the appeal was taken, to wit, June 13th, 1876. *Little v. The Danville, etc., P. R. Co.*, 18 Ind. 86; *Dailey v. The City of Indianapolis*, 53 Ind. 483. It would have been otherwise, had the appeal been taken by the plaintiff; but, had the judgment been for the defendant on his set-off, the plaintiff might have appealed.

The case was appealed to the Fulton Circuit Court. A change of venue was taken from that to the Marshall Circuit Court, on account of prejudice on the part of the people of the county.

In the Marshall Circuit Court, a legal affidavit was filed by the defendant for a change from the judge, which was refused on the ground that the party had had one change of venue.

This court has decided, that the statute allowing but one change of venue means but one each of the kinds allowed by the statute; for example, one for undue influ-

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ence, etc., of a party in the county, and one on account of prejudice of the judge.

The judgment is reversed, with costs, and the cause remanded.

57 268
167 578

CORNTHWAITE ET AL. v. THE FIRST NATIONAL BANK OF
ROCKVILLE.

PROMISSORY NOTE.—*Execution of, by Administrator or Executor.—Personal Liability.—Decedent's Estate not Bound.*—Where, in renewal of a matured promissory note executed by his decedent, the administrator or executor of an estate, as such, executes to the payee a new promissory note, he thereby becomes personally liable, but the estate is not bound.

From the Parke Circuit Court.

S. F. Maxwell and *S. D. Puett*, for appellants.

T. N. Rice and *J. L. Johnston*, for appellee.

BIDDLE, J.—Complaint by the appellee, on the following promissory note:

"\$555.00. ROCKVILLE, IND., Oct. 27th, 1877.

"Twelve months after date, we, or either of us, promise to pay to the order of Wm. E. Livengood, Cas. of the First National Bank of Rockville, Indiana, five hundred and fifty-five dollars, value received, without any relief from valuation or appraisement laws, with interest at ten per cent. per annum after maturity, and reasonable attorney's fees, if suit be instituted for the collection of this note. The drawers and endorsers severally waive protest and notice of protest for non-payment.

"No. 7694.

THOS. CORNTHWAITE, admr.

F. Lapresse estate.

"JOHN LANEY.

"SILAS CARPENTER."

Cornthwaite answered separately, substantially as follows:

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That Francis Lapresse, as principal, and John Laney and Silas Carpenter executed to the plaintiff a joint and several note for five hundred dollars, dated July 26th, 1873, due ninety days after date, with interest at ten per cent. after maturity, waiving, etc., setting out the note; that after the execution of this note, and before the execution of the note sued on, Lapresse died, and this defendant was appointed and qualified as the administrator of his estate; that the note sued on was given in renewal of the former note after it became due, and for no other consideration; that this defendant had no individual interest in the transaction; that the note was given by him as administrator, to bind the estate of Lapresse, as a renewal of the first note; that it was so understood by all the parties liable thereon; and that the original note was assigned to Laney and Carpenter to hold in case they had to pay the note sued on.

Carpenter answered separately, that Cornthwaite is principal in the note, and he only surety, with the usual prayer for protection as such.

There are some other pleadings in the case, other rulings and exceptions, but, as no errors are assigned upon them, they are not stated.

A demurrer, alleging the insufficiency of the facts stated, was sustained to the answer of Cornthwaite, and exception reserved; and this ruling presents the first question for our consideration, which may be disposed of at once, as the appellants do not discuss it in their brief, by saying that the court committed no error in sustaining the demurrer.

Trial by the court; finding for the appellee, and that the makers were all principals as to the payee, and principals between themselves. Over a motion for a new trial and exception, judgment was rendered on the finding.

We think the judgment is correct. Cornthwaite could not bind the estate of Lapresse by signing the note as

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administrator; but he bound himself thereby as principal. *Mills v. Kuykendall*, 2 Blackf. 47; *Carter v. Thomas*, 3 Ind. 213.

There is no evidence showing that either of the makers signed the note as surety for any one of the others; and there is nothing in the circumstances from which such a conclusion could be inferred.

The judgment is affirmed, with costs.

WELBORN ET AL. v. COON, ADM'R.

DECEDENTS' ESTATES.—*Action by Administrator.—Set-off.—Partnership.*—

Where a surviving partner purchases from the administrator of his deceased partner the interest of the latter in the partnership property, as assets of the estate, he can not, in a suit to collect the purchase-money, set off a debt due him from such decedent in his lifetime, even if such set-off grew out of a settlement of partnership matters.

From the Madison Circuit Court.

H. D. Thompson, H. J. Dunbar and J. A. New, for appellants.

J. W. Sansberry and E. B. Goodykoonts, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellants, as defendants, in the court below, to recover the amount due on a promissory note, of which the following is a copy:

"September 5th, 1871. Twelve months after date, we promise to pay to the order of H. Coon, Adm'r of F. F. Rock, deceased, five hundred and fifteen dollars, value received, without any relief from valuation laws, with six per cent. interest from date.

(Signed.)

"J. H. WELBORN.

"CLAUDIUS BOCK.

"W. J. WELBORN, Security."

Welborn et al. v. Coon, Adm'r.

The complaint averred the making of said note by the appellants, and that it was due and remained unpaid, and demanded judgment for six hundred dollars, and other proper relief.

To this complaint, the appellants jointly answered, in two paragraphs, as follows:

1. By way of set-off, the appellants said, in substance, that Jesse H. Welborn and Claudius Bock were principals, and William J. Welborn was surety in the note sued on; that on the 24th day of May, 1871, Francis F. Rock, then in life but since deceased, and said Jesse H. Welborn and Claudius Bock, were engaged as partners in the saw-mill business, and on said day the said Francis F. Rock was accidentally killed; that subsequently the appellee was appointed administrator of said decedent's estate, and as such took possession of said decedent's undivided interest in said partnership business, as assets of said estate; that on September 5th, 1871, the appellee, as such administrator, sold said undivided interest in said saw-mill to said Jesse H. Welborn and Claudius Bock, as surviving partners of said partnership, for five hundred and fifteen dollars, the appellants executing the note in suit for said consideration and for none other; and that the said Francis F. Rock at his death was, and his estate and the appellee, as such administrator, then were, indebted to said Jesse H. Welborn and Claudius Bock, as surviving partners, in the sum of five hundred and forty-two dollars and twenty-five cents, setting out the items of such indebtedness; that for this indebtedness said Jesse H. Welborn and Claudius Bock recovered judgment against the appellee, as such administrator, in the court below, on the 3d day of January, 1874, for five hundred and forty-two dollars and twenty-three cents, which was unpaid; and the appellants Jesse H. Welborn and Claudius Bock offered to set off the same against any amount the appellee might recover against them, in this

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action, and demanded judgment for one hundred dollars, the residue.

2. The second paragraph of said answer was a general denial.

Appellee demurred to the first paragraph of said answer, for the alleged want of sufficient facts therein to constitute a defence to the action; which demurrer was sustained by the court below, and the appellants excepted to this decision.

Notwithstanding this decision, it appears from the record, that afterward the appellee replied in two paragraphs to the first paragraph of the appellants' answer, as follows:

1. A general denial; and,

2. Former recovery by the appellants Jesse H. Welborn and Claudius Bock, against the estate of said Francis F. Rock, deceased, on the same indebtedness set up in the first paragraph of the answer, on the 3d day of January, 1874, by the judgment of the court below for five hundred and forty-two dollars and twenty-three cents, which said judgment was still in full force, unreversed, and unappealed from; wherefore the appellee said, that appellants should not recover on said first paragraph.

The following alleged errors have been assigned by the appellants, in this court:

1st. That the appellee's complaint did not state facts sufficient to constitute a cause of action; and,

2d. The court below erred, in sustaining the appellee's demurrer to the first paragraph of the appellants' answer.

In their argument of this cause, in this court, the appellants' learned attorneys have failed to discuss the first of these alleged errors, or to point out any objection whatever to the sufficiency of appellee's complaint. There is no apparent objection to the complaint; and where, as in this case, the appellants' counsel fail, in argument, to point out their objections to the complaint, we must re-

Welborn *et al.* v. Coon, Adm'r.

gard the alleged error, if any such exists, as thereby impliedly waived. This is the well-established practice of this court. *Breckenridge v. McAfee*, 54 Ind. 141; and *Graeter v. Williams*, 55 Ind. 461.

It seems very clear to us, that the facts stated in the first paragraph of the appellants' answer were not sufficient to constitute a defence to appellee's action.

In the case of *Dayhuff v. Dayhuff's Adm'r*, 27 Ind. 158, it was declared by this court to be "well settled that in a suit by an administrator for a debt due the estate of the decedent, originating, as in this case, after the death of the intestate, the defendant can not set off a debt due him by the intestate before his decease." And the reason assigned for this decision was, that "The principle of mutuality, in such cases, requires that the debts should not only be due to and from the same person, but in the same capacity."

Nor do we think, that the fact, that the indebtedness of appellee's intestate, described in the answer, was due the appellants, as alleged, as surviving partners, can or ought to, in this case, make any difference in the law applicable thereto. It is true, that the appellants, as surviving partners, had the exclusive right to the possession of the partnership property, to sell and dispose of the same, and to settle up the partnership business; but they might, and it seems they did, waive this exclusive right. The appellee, as administrator of the deceased partner's estate, by sufferance of the appellants as we must assume, took possession of, and sold to the appellants, the undivided interest of said decedent in said partnership business; and, upon such sale, the appellants executed to the appellee the note now in suit. Afterward, the appellants filed their claim, and obtained a judgment thereon, in the court below, against said decedent's estate. By these acts of the appellants, it is clear to our minds, that they voluntarily waived any specific

Leasure et ux. v. Coburn.

lien, which they might otherwise have had, on the interest of their deceased partner in the partnership property, or the proceeds of such interest, for the payment of their claim against said decedent's estate.

Parsons, in his treatise on the law of Partnership, p. 450, says, on the subject we are now considering: "The surviving partners, if they hold claims or a balance against the deceased partners, are treated like other creditors."

We have already stated the well-settled law, as applicable to creditors generally, in such cases as the one at bar; and we know of no reason why a different rule of law should be applied to this case.

In our opinion, the court below did not err, in sustaining the appellee's demurrer to the first paragraph of the appellants' answer.

The judgment of the court below is affirmed, at the appellants' costs.

87	274
133	282
57	274
144	612

LEASURE ET UX. v. COBURN.

FRAUDULENT CONVEYANCE.—*Action to Set Aside.*—*Instruction to Jury.*—*Title-Bond.*—A judgment debtor, who held a title-bond for the conveyance of certain real estate, being unable to pay the purchase-money, sold and assigned the same to another, who paid the purchase-money and received a conveyance of such realty. The judgment-creditor having instituted an action to subject such realty to the payment of his judgment, the court trying the cause instructed the jury, that, if the defendant had received such conveyance with knowledge of such judgment, thus placing property of the judgment-debtor beyond the reach of execution, that fact was a sufficient badge of fraud to infer that such sale had been fraudulent.

Held, that the question of fraud was one for the jury alone, and that the instruction was erroneous.

From the Madison Circuit Court.

Leasure et ux. v. Coburn.

J. W. Sansberry, E. B. Goodykoonts and C. D. Thompson, for appellants.

R. Lake, for appellee.

PERKINS, C. J.—Suit to set aside a conveyance as fraudulent. Judgment for plaintiff, appellee in this court.

Jennie Coburn obtained a personal money judgment against Samuel Leasure, in the Madison Circuit Court, on the 21st day of August, 1874, on which execution was duly issued, and, on the 23d day of September, 1874, returned “no property found.”

There was evidence tending to show, that, in June, 1873, said Samuel Leasure held a title-bond for a lot in the city of Anderson, Madison county, Indiana; that he had not paid, and could not pay, for the lot; that, in the month named, he assigned the bond to the now Eliza Leasure, then a single woman, but since intermarried with said Samuel Leasure; that said Eliza paid the purchase-money of the lot, with her own money, to Mr. Hazlett, the maker of the title-bond, and subsequently received a deed from him for the property; that, at the time she received the assignment of the title-bond and paid for it, she had no knowledge of the claim of Jennie Coburn, though she might have had, when, afterward, she received the deed.

In this suit to subject the lot to the payment of said Coburn judgment, rendered in August, 1874, the court instructed the jury, that “If you believe from the evidence that Samuel Leasure was indebted to this plaintiff, and the defendant Eliza Leasure had knowledge of such indebtedness, and, with such knowledge of his indebtedness, took a conveyance to the lot in controversy, and thereby took from said Samuel Leasure a conveyance of his interest in such lot, whereby the property of the defendant Samuel Leasure, subject to the payment of such debt, was transferred from him and placed out of the reach of the creditors of said Samuel Leasure; these circumstances are sufficient badges of fraud from which you may

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infer that the sale was made to hinder, delay or defraud the plaintiff in the collection of her debt."

The giving of this instruction was excepted to and made a ground of a motion for a new trial, which motion was overruled, and exception taken.

The instruction was erroneous, and the error was not cured by any action had in the cause.

Our statute enacts, (1 R. S. 1876, p. 506, sec. 21,) that "The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

Questions of fact are for the jury. The court erred in telling them what facts were sufficient to justify them in inferring fraud. *Kane v. Drake*, 27 Ind. 29; *Parton v. Yates*, 41 Ind. 456; *Sherman v. Hogland*, 54 Ind. 578; *Pence v. Croan*, 51 Ind. 386.

The court seems to have ignored the fact that the lot was paid for before the deed was made.

Other errors are assigned, but it is not necessary that we notice them in this opinion.

The judgment is reversed, with costs, and the cause remanded.

57	276
124	525
57	276
139	406

WARD v. MONTGOMERY.

TAXES.—*Assessment of.*—*Action to Quiet Title.*—*Evidence.*—*Tax Deed.*—*Personalty* should be first Sold.—Where a tax deed fails to show that the personal property of the delinquent had been exhausted before the sale of his real estate, or that he had no such property, such deed, unless accompanied by proper evidence of such fact, is inadmissible as evidence of title.

SAME.—*Defect in Tax Deed.*—*Remedy of Holder.*—*Decree.*—Where, in such

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action, through defects in his tax deed, the holder fails to establish his title to the real estate, he is entitled to have a decree against the realty for the amount found due him, under the provisions of section 257, 1 R. S. 1876, p. 129.

From the Montgomery Circuit Court.

W. H. Thompson and J. M. Thompson, for appellant.

J. M. LaRue, for appellee.

PERKINS, C. J.—Suit by Ward, plaintiff and appellant, to quiet title to a tract of land he holds by virtue of a tax sale and deed.

Answer in general denial.

On the trial, the plaintiff offered in evidence his tax deed. The defendant objected to its admission, till proof had been made showing that the sale, on which the deed was given, was legal. And the bill of exceptions states, "Said plaintiff making no offer to prove said precedent steps then or at any other time, the court sustained the objection, and excluded the deed."

There was no error in this. The court pursued the correct practice. It did not exclude the evidence, till it had given the party offering the item time to say whether he could, in the course of the trial, supply the further proof necessary to make the deed available as evidence. *The Pittsburgh, etc., R. W. Co. v. Conway, ante*, p. 52.

Personal property, if such is possessed by the owner of the realty, within the jurisdiction of the officer, must be sold for taxes before the realty. *Abbott v. Edgerton*, 53 Ind. 196. And unless the tax deed shows that such was the fact, or that personal property could not be found, proof *aliunde* of the facts must be given on the trial, before the tax deed is of any force as evidence of title. *Ellis v. Kenyon*, 25 Ind. 134, is in point. The tax deed is evidence only of the facts recited in it. 1 R. S. 1876, p. 123, sec. 224; and the deed in question made no recitation on the subject of personal property.

The court then proceeded, under section 257, 1 R. S.

Dixon *et al.* v. Hunter.

1876, p. 129, to ascertain the amount due the plaintiff, and gave him a decree therefor. The defendant excepted. The action of the court was within the statute.

The judgment is affirmed, with costs, etc.

DIXON ET AL. v. HUNTER.

57 278
153 661

MORTGAGE.—Recording Assignment.—Notice.—Prior to the taking effect of the act of March 6th, 1877, (Acts 1877, Reg. Sess., p. 99,) which provides for recording assignments of mortgages, there was no statute requiring such record and making it notice, and therefore assignees were guilty of no laches in not recording such assignments.

SAME.—Foreclosure by Assignee.—Rights of Junior Mortgagee.—Pleading.—Former Adjudication.—In an action for foreclosure, prior to the taking effect of such act, by an assignee who had not placed his assignment on record, against the mortgagee, mortgagor and a junior mortgagee, the latter answered, that theretofore, after the date of the assignment to the plaintiff, in an action by a third person against the senior mortgagee and the mortgagor, such senior mortgage had been adjudged satisfied, and that, relying upon such decree and without notice of the assignment to plaintiff, he had, in good faith, taken his mortgage.

Held, on demurrer, that the answer is insufficient.

From the Ripley Circuit Court.

W. D. Willson and *T. E. Willson*, for appellants.

G. Durbin, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellants, as defendants, in the court below.

In his complaint, the appellee alleged, in substance, that on the 19th day of May, 1868, the appellant Rebecca Dixon and her husband, John Dixon, then in full life but since deceased, executed a mortgage, conveying to the appellant Archelaus Lingo the real estate in Ripley County, Indiana, therein described, as security for the payment of two notes, of even date with said mortgage,

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each for the sum of three hundred and twenty-five dollars, executed by the mortgagors, and payable in one and two years from date to the order of said mortgagee; that the said mortgage was duly recorded in the recorder's office of said Ripley county, on the 27th day of May, 1868; that the note payable one year after date had been fully paid; that the appellant Archelaus Lingo assigned in writing the said mortgage, and, without writing but by delivery, the said note payable two years after date to one Jephtha Fleming, who assigned, in writing, the said note and mortgage to the appellee, and said note was due and unpaid. Copies of the said last-mentioned note and mortgage, and of the written assignments thereof, were filed with and made parts of the complaint; and the said Archelaus Lingo was made a defendant to answer as to his interest in said note. The appellant Joseph Dunlap was made a defendant, as a junior mortgagee; and the other appellants were made defendants, as the only heirs at law of said John Dixon, deceased. And judgment was demanded for six hundred dollars, the foreclosure of the mortgage, the sale of the property, etc.

To this complaint, the appellant Joseph Dunlap separately answered in five paragraphs; but subsequently he withdrew the first and fourth paragraphs of said answer, leaving in the record only the second, third and fifth paragraphs thereof. The appellee's demurrers to the said second, third and fifth paragraphs of said Joseph Dunlap's answer, for the want of sufficient facts in either paragraph to constitute a defence to the action, were severally sustained by the court below, and to these decisions the appellants excepted. The appellant Archelaus Lingo answered the complaint, admitting his transfer of the note and mortgage sued on to Jephtha Fleming. The appellant Joseph Dunlap failing to answer further, and the other appellants making default, the cause was tried by the court, and a finding and judgment made and rendered in

Dixon et al. v. Hunter.

favor of appellee, for the amount due on said note, and for the foreclosure of said mortgage, etc.

The only alleged errors of the court below, assigned by the appellants in this court, are the decisions of the former court, in sustaining the appellee's demurrers to the second, third and fifth paragraphs of said Dunlap's answer. These three paragraphs of answer set up substantially the same defence. We need not set them out in detail, but we will give the substance of the defence relied upon by said Joseph Dunlap, in each of said paragraphs of answer. Before doing so, however, we may premise, that it appears from the exhibits filed with appellee's complaint, that the mortgage sued upon was assigned by the mortgagee, Lingo, to said Jephtha Fleming, on the 19th day of May, 1869, and that both the note and mortgage sued on were assigned by said Fleming to the appellee, on the 24th day of November, 1869.

The appellant Dunlap's defence to appellee's action may be summarized, as follows: That on the 1st day of March, 1873, in an action in the court below, wherein one William S. Rice was plaintiff, and said Rebecca Dixon and John Dixon, her husband, then living, and said Archelaus Lingo, the mortgagee in the mortgage sued on in this action, were defendants, the said court rendered judgment that said mortgage had been fully paid off and satisfied, which said judgment was of record in the proper order book of the court below; that no record was ever made of the assignments of the mortgage sued on, and that said Dunlap had no notice, actual or otherwise, that any assignment of said mortgage had ever been made by said Archelaus Lingo or any other person; that on the faith of said judgment of satisfaction of said mortgage, and fully believing that said mortgage was paid off and satisfied, the said Joseph Dunlap, in good faith, on the 7th day of March, 1873, took from said John and Rebecca Dixon, then the owners of said real estate, a mortgage thereon to secure the payment of their

Dixon *et al.* v. Hunter.

note to him, of the same date, for six hundred and twenty-five dollars, payable five years after date; that his said mortgage and note were wholly unpaid and unsatisfied; and that said judgment of satisfaction of the mortgage sued on by the appellee was unreversed and then in full force. And said Dunlap asked that his said mortgage might be declared a prior lien on said real estate to the mortgage sued on by appellee.

It is a clear proposition, we think, too plain for argument, that the appellee's demurrers were properly sustained by the court below to the second, third and fifth paragraphs of said Dunlap's answer. At the time the mortgage sued upon by the appellee was assigned by the mortgagee to Jephtha Fleming, or by said Fleming to the appellee, and, indeed, until the laws of 1877 were "published and circulated in the several counties of this State, by authority," there was no law or statute providing for the record of the assignments of mortgages, and making such record notice. Therefore, no laches can be imputed to the appellee or his assignor. It will not do to say that the appellee is bound and concluded, or in any wise affected, by the judgment of satisfaction of said mortgage against the mortgagee, made and entered long after the mortgagee had ceased to have any interest in the mortgage debt, without any notice, actual or constructive, of the proceedings and judgment, to the appellee, as the holder of said mortgage debt. This conclusion is in strict harmony with the doctrine of the case of *Hasselman v. McKernan*, 50 Ind. 441. But it seems to us that the case of *Lapping v. Duffy*, 47 Ind. 51, is decisive of the case at bar. In the case last cited, the mortgagee, after he had parted with the mortgage debt, was induced to enter an acknowledgment of satisfaction of the mortgage, on the record thereof; and it was held by this court, that such entry of satisfaction did not affect the rights of the holder of the mortgage debt, and that incumbrancers whose liens were acquired after such entry would not be

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protected as purchasers for value, without notice of such prior lien.

By an act approved March 6th, 1877, to amend section 7 of "An act concerning mortgages," approved May 4th, 1852, (2 R. S. 1876, p. 335,) the law on this subject of the assignment of mortgages has been, as we think, wisely changed and improved. By this amendatory act, which became a law on the 2d day of July, 1877, provision is made for the record of the assignments of mortgages, and "the mortgagor and all other persons shall be bound" by the record thereof. Acts 1877, Reg. Sess., p. 99

In our opinion, no error was committed by the court below, in sustaining the appellee's demurrers to the second, third and fifth paragraphs of said Joseph Dunlap's separate answer.

The judgment of the court below is affirmed, at the appellants' costs.

BALES ET AL. v. BROWN.

57	282
130	486
57	282
151	82

AMENDMENT.—Of Judgment.—Nunc Pro Tunc Entry.—Notice.—Where, by mistake, the name of a party, against whom, with others, a judgment has been rendered, is omitted from the entry of such judgment, such mistake may, on proper notice to all concerned, be corrected at any time by a *nunc pro tunc* entry, if there be some preceding entry in the original cause, by which the correction may be made.

From the Monroe Circuit Court.

R. A. Fulk, for appellants.

G. W. Grubbs, for appellee.

BIDDLE, J.—Notice and motion to correct a record by a *nunc pro tunc* entry, brought after the term at which the record was made had expired.

The notice states, that the court, at a previous term,

had rendered judgment in the case against Jackson Bales, Stephen Bales and Thomas I. Farr, but, by a misprision of the clerk, the judgment was entered against Jackson Bales alone; that afterward Thomas McGinnis entered himself as replevin bail upon the judgment, as rendered, against all the defendants, and moved the court to correct the record by a *nunc pro tunc* entry, so as to show that the judgment was rendered against the three defendants, instead of only one.

The defendants jointly demurred to the motion for want of facts, and the defendants Jackson Bales and Thomas McGinnis jointly demurred for misjoinder of parties in making them defendants.

The court overruled the demurrers, and the appellants excepted. They then answered, and the cause was heard by the court, and the record ordered to be corrected by a *nunc pro tunc* entry, as moved. The appellants prepared the case, and appealed from the judgment to this court.

This proceeding is simply a motion made upon notice to the opposite parties, and all interested in the case were properly notified. Such a notice does not contemplate adversary pleadings, like an original civil action. It is auxiliary to the preceding record in the case, and not an independent suit. The pleadings, however, and the rulings of the court upon them, are harmless.

There is a bill of exceptions in the record, filed upon overruling a motion for a new trial. It contains certain evidence, but it does not inform us that it contains all the evidence given at the hearing of the motion. The court below doubtless decided correctly; at least there is nothing in the record that shows us to the contrary. *Nunc pro tunc* entries to correct records may be made at any time, on notice, when there is something preceding the misprision, by which the correction may be made. *Fite v. Doe*, 1 Blackf. 127; *Songer v. Manwaring*, 1 Blackf. 251; *King v. Anthony*, 2 Blackf. 131; *Smith v. Myers*, 5 Blackf.

Stall *et al.* v. Cassady, by his next Friend.

223; *McManus v. Richardson*, 8 Blackf. 100; *Makepeace v. Lukens*, 27 Ind. 435.

The judgment is affirmed, with costs.

STALL ET AL. v. CASSADY, BY HIS NEXT FRIEND.

PARTNERSHIP.—Dissolution.—Notice of.—Liability of Retiring Partner.—A retiring partner, who desires to avoid liability for future debts of the new firm, which may be contracted by it to persons who have had dealings with the old firm, must cause notice of his retirement to be given to such persons.

From the Boone Circuit Court.

S. M. Burke, for appellants.

S. H. Buskirk and *J. W. Nichol*, for appellee.

PERKINS, C. J.—Suit upon a promissory note, against Thompson and Stall as makers. Answer, by Stall, of *non est factum*. Thompson made default. Trial by the court. Judgment for the plaintiff. New trial denied. Appeal. Error assigned, overruling the motion for a new trial upon the evidence.

It appeared by the evidence, that William A. Thompson and Robert Stall were partners during the years 1871, 1872, and a part of 1873; that their office was in Indianapolis; that in the early part of 1873, Stoll retired from the firm, but gave no notice whatever of the fact. At its date, the following note was given for a balance due for services rendered in 1872 and 1873 to the firm of Thompson & Stall:

“\$52.86.

INDIANAPOLIS, July 28th, 1873.

“Ninety days after date, we promise to pay to the order of W. T. Cassady, at the Merchants National Bank of Indianapolis, Ind., fifty-two 86-100 dollars, with ten per cent. interest after maturity, and attorney’s fees if suit be

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instituted on this note; value received, without any relief from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest and notice of protest of this note.

“THOMPSON & STALL.”

Stall contends that the note is not his, even as to an innocent holder, as it was executed after his retiring from the firm.

It is just that he should be liable on the note, in this case; and that he is, would seem to be decided in the cases of *Hunt v. Hall*, 8 Ind. 215, *Cregler v. Durham*, 9 Ind. 375, and cases cited in note.

If Thompson had given the note in question, for a new consideration in the line of the partnership, to the plaintiff, it would have bound Stall, under the circumstances of this case. Surely then, it should bind him for a debt for which he is actually liable, and that it does so is established by the following cases, in addition to those above cited: *Hutchins v. Sims*, 8 Humph. 423; *Ketcham v. Clark*, 6 Johns. 144; *Kirkman v. Snodgrass*, 3 Head, 370. In this latter case, the following proposition is decided:

“Persons who have had previous dealings with a firm must have actual notice of its dissolution before they are deprived of their right to hold all its members responsible for the contract of one, made in good faith, in the name of the firm.”

Nearly the same doctrine is held in *Lowe v. Penny*, 7 La. An. 356, and in *Pratt v. Page*, 32 Vt. 13.

The judgment is affirmed, with costs.

Hawthorn *et al.* v. The State, *ex rel.* Harper.

57 286
143 74

HAWTHORN ET AL. v. THE STATE, EX REL. HARPER.

STATUTE OF LIMITATIONS.—*Action on Official Bond.*—*Township Trustee.*—An action upon the official bond of a township trustee, if not commenced within three years after the accruing of the cause of action, is, as to sureties, barred by the statute of limitations.

SAME.—*Amendment.*—*New Relator.*—If an action upon such bond be commenced within three years after the cause of action has accrued, by an incompetent relator, and, after the expiration of that time, a substituted complaint by a competent relator be filed in such cause, the action, as to sureties, is barred.

From the Ripley Circuit Court.

E. P. Ferris and *W. K. Spencer*, for appellants.

W. D. Ward and *J. B. Rebuck*, for appellee.

PERKINS, C. J.—A suit, on the relation of a different party, against the same defendants, was before this court and decided at the November term, 1874. *Hawthorn v. The State, ex rel. Johnson Township*, 48 Ind. 464. The judgment in that case was reversed.

Afterward, a substituted complaint was filed by the present relator. The substituted complaint is the only one appearing in the record of the cause now before us. We know nothing of the contents of the former. The substituted complaint was filed on the 8th day of September, 1875. It was based upon the official bond of John M. Stewart, as township trustee, and alleged a cause of action accruing in October, 1870.

A demurrer to the complaint was overruled, and exception taken.

The defendant then filed several paragraphs of answer of the statute of limitations of three years, and, also, other paragraphs. A demurrer was sustained to each and all of those setting up the statute of limitations, and exceptions were reserved.

We will first consider and decide the question of limitation; for, if the suit is barred by that statute, we need examine no other question.

Hawthorn *et al.* v. The State, *ex rel.* Harper.

Suits against the makers of official bonds must be commenced within three years from the time the cause of action accrued. 2 R. S. 1876, p. 122, sec. 211; *Pickett v. The State, ex rel., etc.*, 24 Ind. 366. But, by the appellee, it is contended, that, as matter of fact, this suit was commenced within that time; and that the substitution of a new complaint, on the relation of a new party, after the expiration of three years, is but a continuation of the suit commenced by a former incompetent relator, which was commenced within three years; while, on the other side, this proposition is denied.

In a suit upon the official bond of a township officer, the relator is the real plaintiff, and the question is, whether a suit by a plaintiff who has no cause of action, and is dismissed from court for that reason, can prevent the running of the statute against the plaintiff who has the cause of action, but neglects to sue upon it.

In *Lagow v. Neilson*, 10 Ind. 183, it is said:

"Generally speaking, an amendment to a complaint has relation to the time the complaint was filed; but this never occurs when such amendment sets up a title not previously asserted, and which involves the question of the statute of limitations. *Miller v. McIntire*, 1 McLean, 85; Same Case, 6 Pet. 62." See, also, *Jones v. Porter*, 23 Ind. 66, where the same doctrine is held, as to the introduction of a new party.

We think this suit can not be regarded as having been commenced by the former relator, and that, as to the sureties, it is barred by the statute of limitations.

It is not within section 218 of the practice act. 2 R. S. 1876, p. 127.

The judgment is reversed, with costs, and the cause remanded, etc.

Poffenberger v. Blackstone.

POFFENBERGER v. BLACKSTONE.

REAL ESTATE, ACTION TO RECOVER.—*Unlawful Detention.—Defences Admissible without Plea.—Evidence.—Harmless Error.*—In an action to recover real estate, brought under the provisions of the acts of May 13th, 1852, and March 4th, 1853, (2 R. S. 1876, p. 662,) "concerning the unlawful detention of lands," etc., all defences may be given in evidence without plea, and, therefore, the sustaining of a demurrer to an answer is harmless. SAME.—*Supreme Court.—Practice.—Record.*—Where, in such action, the evidence is not in the record, on appeal to the Supreme Court, no question is presented by the overruling of a motion for a new trial.

From the Wells Circuit Court.

D. T. Smith, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.

Howk, J.—The appellee, as plaintiff, sued the appellant, as defendant, in the court below.

In his complaint, the appellee alleged, in substance, that on the 29th day of June, 1872, "and at sundry other times thereafter," the appellant became the tenant of the appellee of in-lot number six, on the recorded plat of Jacob Poffenberger's addition to the town of Bluffton, Wells County, Indiana, and as such became indebted to the appellee, at sundry times, for the sum of one hundred and eight dollars, rent for said premises, which sum was all due and unpaid on the 27th day of December, 1873; whereupon the appellee served on the appellant a written notice, by copy delivered to appellant on the 12th day of January, 1874, notifying the appellant, as appellee's tenant, that said rent was due and unpaid, and that appellant must quit possession of said premises within ten days from said service, a copy of which notice was attached to said complaint as a part thereof; that said ten days elapsed on the 22d day of January, 1874; and that said tenant, having failed to pay said rent or any part thereof, then held possession of said premises, unlawfully detaining the same from the appellee, to the appellee's damage ten dollars; wherefore the appellee demanded judgment for the pos-

session of said premises and ten dollars damages for said unlawful detention, and for other proper relief.

To the appellee's complaint, the appellant answered in three paragraphs; the first of which was a general denial, and each of the other two set up affirmative matter, in bar of the action. Appellee's demurrers to the second and third paragraphs of the answer, for the want of sufficient facts, were severally sustained by the court below, and to these decisions the appellant excepted. The view which we have taken of this cause makes it unnecessary for us to set out at length the several paragraphs of appellant's answer.

And the action being at issue on the general denial, there was a trial by the court below, without a jury, and the court found for the appellee, that he was entitled to the possession of the premises described in his complaint. And the appellant's written motion for a new trial having been overruled, and his exception saved thereto, judgment was rendered by the court below on its finding.

The appellant has assigned, in this court, the following alleged errors of the court below, to wit:

1st. In sustaining the appellee's demurrer to the second paragraph of the appellant's answer;

2d. In sustaining the appellee's demurrer to the third paragraph of the appellant's answer; and,

3d. In overruling the appellant's motion for a new trial.

The first two of these alleged errors may well be considered together. And the first thought which suggests itself, in considering the questions presented by these two errors, is, that the second and third paragraphs of the appellant's answer were improper and unnecessary pleadings, in such actions or proceedings as the one now before us. It is manifest, from the averments of his complaint, that the appellee brought this action against the appellant under the provisions of an act entitled "An act concerning

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the unlawful detention of lands and the recovery thereof," approved May 13th, 1852. 2 R. S. 1876, p. 662. As originally enacted, this act authorized the commencement of such actions as this, only before a justice of the peace of the county in which the lands lay; but, by an act approved March 4th, 1853, it was provided, that, in all such actions, the courts of common pleas should have concurrent jurisdiction with justices of the peace. 2 R. S. 1876, p. 662, note 3. By the provisions of the 79th section of the act abolishing courts of common pleas, etc., approved March 6th, 1873, circuit courts had the same jurisdiction conferred on them, as had before that time been exercised by courts of common pleas. 1 R. S. 1876, p. 390. Circuit courts now have, therefore, concurrent jurisdiction with justices of the peace, in all such actions.

But the actions are statutory, and, so far as the pleadings and practice therein are concerned, they are governed by the provisions of the first mentioned act of May 13th, 1852, *supra*. This act, as we construe it, does not contemplate nor provide for the filing of any pleading or answer by the defendant in such actions. The act specifies what the complaint, in such an action, shall contain, but the only provision in regard to the proceedings subsequent to the complaint contemplates that such proceedings shall be the same as "in civil cases before justices." 2 R. S. 1876, p. 663, sec. 4.

"All matter of defence, except the statute of limitations, set-off, and matter in abatement may be given in evidence without plea," in civil cases before justices. 2 R. S. 1876, p. 612, sec. 34. It follows, therefore, that all the matters of defence, which were stated and set forth in the second and third paragraphs of the appellant's answer, in this action, might have been given in evidence on the trial, "without plea." This being so, it is clear that no harm was done the appellant by the decision of the court below, sustaining the appellee's demurrers to these paragraphs of answer. It has often

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been held by this court, that it is a harmless error to improperly sustain a demurrer to a paragraph of answer, when all the material facts alleged therein are admissible otherwise, without such paragraph. *Strough v. Gear*, 48 Ind. 100, and *Maxwell v. Brooks*, 54 Ind. 98.

Our conclusion is, that the first and second alleged errors, in this cause, are not available to the appellant for any purpose.

The evidence on the trial of this cause, in the court below, is not in the record; and, therefore, the third alleged error presents no question for our consideration.

We find no error in the record.

The judgment of the court below is affirmed, at the appellant's costs.

OWEN v. OWEN, ADM'R.

DECEDENTS' ESTATES.—*Descents.—Adultery of Wife.—Allowance of Widow.—*

Where a wife has abandoned her husband, and, at the time of his death, is living in adultery, the 32d section of the statute of descents prevents her from taking the personal property otherwise allowed by statute to the widow.

SUPREME COURT.—*Practice.—Bill of Exceptions.—*The truth of matter alleged as cause for a new trial must, on appeal to the Supreme Court, be shown by a bill of exceptions, unless it otherwise appears.

From the Hendricks Circuit Court.

J. H. Goodwin, for appellant.

L. M. Campbell, for appellee.

WORDEN, J.—Jennie A. Owen filed her claim against the estate of the deceased, claiming as his widow the sum of five hundred dollars, the amount allowed by law to widows of deceased persons.

The administrator answered, that the said Jennie was the widow of the deceased, but that she had abandoned

Owen v. Owen, Adm'r.

her said husband before his death, and was, at the time of his death, living in adultery with one James Miller; wherefore, etc.

The plaintiff demurred to this answer for want of sufficient facts, but the demurrer was overruled, and she excepted. Reply in denial, trial by jury, verdict and judgment for the defendant.

Errors are assigned upon the ruling on the demurrer, and in overruling a motion for a new trial.

The question arising on the demurrer is, whether a woman who abandons her husband in his lifetime, and is, at the time of his death, living in adultery, is entitled to the five hundred dollars allowed by statute to widows generally.

The statute of descents, approved May 14th, 1852, provides, that, "If a wife shall have left her husband, and shall be living at the time of his death, in adultery, she shall take no part of the estate of her husband." 1 R. S. 1876, p. 413, sec. 32.

Section 21 of the same statute provides, that a surviving wife should be entitled in certain cases to three hundred dollars, before distribution.

Then the act providing for the settlement of decedents' estates, approved June 17th, 1852, provided, that a widow might select property appraised not to exceed in value three hundred dollars. 2 G. & H., p. 495, sec. 43. The section last cited was amended in 1869, so as to give the widow five hundred dollars in property at its appraised value, or in money out of the first received by the administrator. It was again amended in 1871, making the amount payable out of real estate, in case of a deficiency of personal, and payable in the same order in which judgments and mortgages are payable. See 2 R. S. 1876, p. 507, sec. 43.

None of these statutes providing for surviving wives repeal, expressly or by implication, the 32d section above set out, on the subject of descents. The law of de-

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scents and that regulating the settlement and distribution of estates are upon the same general subject, and may well be construed together. And construing them together, letting the provisions of each stand as far as possible consistently with the evident purpose and design of the whole, it is clear that a surviving wife is not entitled to the five hundred dollars if she come within the provision in section 32 of the act on the subject of descents. We are of opinion, taking the statutes altogether, that it was not the intention of the Legislature to give the surviving wife the five hundred dollars in case she had left her husband and was living, at the time of his death in adultery, and, therefore, that the court committed no error in overruling the demurrer to the answer.

No question arises on the motion for a new trial. The evidence is not in the record, nor is there any bill of exceptions. One of the causes assigned for a new trial was, that the court excluded the plaintiff as a witness in her own behalf, when offered to prove certain matters set out. But the truth of the cause assigned for a new trial must be made to appear by a bill of exceptions, unless it otherwise appears. *Bishop v. Welch*, 54 Ind. 527. There is nothing in the record showing the truth of the cause assigned for a new trial.

The judgment below is affirmed, with costs.

DODDS, ADM'R, v. DODDS.

DECEDENTS' ESTATES.—Claim.—Pleading.—A plain and succinct statement, duly verified, without the formality usual in a complaint, is all that is required in a claim filed on account against the estate of a decedent.

PRESUMPTION.—Judgment.—Settlement.—Matters of account existing between parties prior to the rendition of a money judgment in favor of one, against the other, are presumed to have been settled before its rendition.

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SAME.—Payment.—Lapse of Time.—The mere lapse of almost three years' time from the rendition of a judgment is not ground for presuming that it has been paid.

From the Shelby Circuit Court.

J. B. McFadden, for appellant.

O. J. Glessner, J. T. Hockman, S. H. Buskirk and J. W. Nichol, for appellee.

BIDDLE, J.—Matthew M. Dodds filed his claim against the estate of John M. Dodds, of which Perry P. Dodds was the administrator, in the following words and figures:

"The estate of John M. Dodds, deceased, in account with M. M. Dodds:

"August 5th, 1867, quart whiskey,	. . .	\$1 00
"February 12th, 1868, " "	. . .	1 00
"March 8th, 1868, " "	. . .	1 25
"June 29th, 3 quarts in my absence,	. . .	3 00
"July 7th, to balance owing on trip West,	. . .	11 20
"July 7th, to order of Slocum,	. . .	100 00
"December 17th, whiskey,	. . .	1 00
"September 29th, 1869,	. . .	1 00
"February 13th, 1869, to check, \$43 85, }		
Labor for filling, . . . 25, }	. . .	44 10
"April 1st, 1869, whiskey,	. . .	1 00
"April 5th, " check,	. . .	100 00
"May 7th, " check,	. . .	50 00
"May 22d, cash paid Mrs. Frazier,	. . .	50 00
Cash received of M. M. Dodds,	. . .	16 00
"May 24th, check,	. . .	100 00
"July — whiskey,	. . .	1 00
"Dec., 1869, " "	. . .	2 00
"June 8th, 1870, cash paid by Slocum,	. . .	252 70
"May 23d, 1869, check omitted at time, but I found in check-book Oct. 12th, 1872, and now ch'd,	. . .	50 00
"Bringing J. M. Dodds' son's remains, and coffin and expressing at Chattanooga,	. . .	100 00
"Travelling expenses in this charge, etc.,	. . .	100 00

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CR. BY.

"Dec. 26th, 1868, by lard, . . .	\$ 4 40
"By 21 bushels barley, \$2 10, . . .	44 10
"1869, by wheat settled and put on books and receipted, given up, making together,	206 25
	<hr/>
	\$254 75
"May 15th, 1873, interest, 113 67
	<hr/>
"Balance due, . . .	\$945 17

"State of Indiana, Shelby county.

"Before the clerk of the common pleas of said county and State, came Matthew M. Dodds, who, being by me duly sworn, says, that the annexed in favor of Matthew M. Dodds, against the estate of John M. Dodds, deceased, is correct, that no payments have been made thereon except ——— thereon given, that there are no set-offs against the same to his knowledge and belief, that the balance shown in said claim, to wit, seven hundred and forty-five and 17-100, is now justly due and owing to said claimant; all of which he verily believes.

"M. M. DODDS.

"Subscribed and sworn to before me on the 16th day of May, 1873. JOHN ELLIOTT, Clerk."

The administrator demurred to the claim, which stands in the place of a complaint, because, as he alleged, it did not state facts sufficient to constitute a cause of action.

The demurrer was properly overruled. The complaint is sufficient. *Ginn v. Collins*, 43 Ind. 271.

The administrator answered by a general denial, under which the parties agreed that he might "introduce all evidence legitimate to his defence."

Trial by jury, and verdict for appellee for eight hundred and sixty-six dollars.

Questions of law in giving certain instructions to the jury, and the sufficiency of the evidence to sustain the verdict, are properly raised by a motion for a new trial.

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After the appellee had introduced his evidence tending to support his claim, he introduced a judgment founded on two promissory notes in favor of the decedent, rendered in the Shelby Common Pleas Court, March 19th, 1872, against the appellee, for twelve hundred and eighty dollars and seventy-five cents.

In answer to this judgment, the appellee introduced five several checks on The First National Bank of Shelbyville, all dated in the year 1869, and amounting in all to three hundred and forty-three dollars and eighty-five cents, and claimed that they were payments made on the notes upon which the judgment was rendered, but had never been credited either on the notes or the judgment.

It will be noticed that these checks, which correspond with those set out in the claim, and all the items in the claim filed by the appellee, except the interest charged, are dated nearly three years anterior to the rendition of the judgment, and must therefore be presumed to have been settled before that time.

The evidence is all before us, but there is none showing, or in the least tending to show, that the judgment introduced in evidence, or any part of it, has been paid. Even the claim filed does not amount to as much as the judgment.

The argument of the appellee, in answer to these facts, is as follows:

“There is not a syllable of testimony in the record going to prove that this judgment was an existing debt against the appellee at such time, and yet the counsel for the appellant insists that the evidence shows the appellee owing said judgment, which was rendered nearly three years prior to the trial of this cause.”

This reasoning is unsound. The judgment, on its face, shows, that it “was an existing debt against the appellee” at the time. A judgment is not presumed to be paid in “nearly three years” after its rendition. The onus of the proof of its payment or satisfaction was on the appellee; and, as he has introduced no evidence to prove its pay-

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ment or satisfaction, it must be held as in force against him.

Under this rule of law, the verdict is so clearly unsustained by evidence that we need not consider the case any further.

The judgment is reversed, with costs, and the cause remanded, with directions to sustain the motion for a new trial.

57	297
120	476
57	297
155	92
57	297
165	580

THE CINCINNATI, HAMILTON AND DAYTON R. R. Co. v.
CHESTER.

NEGLIGENCE.—Parent, Wife and Child.—Joinder of Actions.—Pleading.—Where by means of the same negligent act of one person, bodily injuries are inflicted upon another, his wife and his minor child, resulting in the loss to him of his wife's services, and the expenditure by him of means and labor in healing and caring for himself and his child, all constitute but a single cause of action, and may be united in a single paragraph of a complaint to recover damages therefor.

SAME.—Action by Parent for Death of Child.—Misjoinder of Actions.—An action by the father, to recover damages for the death of his minor child, caused by the negligence of another, is statutory, and can not be joined with an action by him to recover for personal injuries received by himself, though caused by the same negligent act.

SAME.—Practice.—Motion to Separate into Paragraphs.—Where a complaint contains several causes of action, a proper motion to separate them will lie; but, if made too broad, it should be overruled.

SAME.—Railroad.—Allegations of Negligence.—Pleading.—Demurrer.—Motion to make Specific.—In an action against a railroad company, to recover damages for injuries received by the plaintiff while travelling on the defendant's road, alleged to have been caused by the negligence of the defendant, the complaint alleged, that, "without any fault, carelessness or negligence on his part," etc., the car in which he was riding was, "by and through the fault, carelessness and negligence of the" defendant, her agents and employees, thrown from the track, thereby causing the injuries complained of.

Held, on demurrer, that the allegation of negligence is sufficient.

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Held, also, that a motion to make the complaint more specific in its allegation of negligence on the part of the defendant should have been sustained.

From the Wayne Circuit Court.

W. A. Bickle and A. M. Sinks, for appellant.

J. C. McIntosh and B. F. Claypool, for appellee.

Howe, J.—The appellee, as plaintiff, sued the appellant and The Cincinnati, Hamilton and Indianapolis Railroad Company, as defendants, in the Fayette Circuit Court.

Appellee's complaint is in a single paragraph; and, omitting the venue, the name of the court, and the signature of counsel, the complaint is in these words:

“Marion Chester complains of The Cincinnati, Hamilton and Indianapolis Railroad Company, a corporation organized and doing business in the State of Indiana, under the laws thereof, and The Cincinnati, Hamilton and Dayton Railroad Company, a corporation organized under the laws of the State of Ohio, defendants, and says, that heretofore, to wit, on the 31st day of December, in the year 1873, the said defendants were in possession, and had control, of a certain railroad, leading from the city of Hamilton, in the county of Butler, and State of Ohio, to the city of Indianapolis, and State of Indiana, and passing through the counties of Union, Fayette, Rush, Shelby, Hancock and Marion, in the State of Indiana, and passing by and through the city of Connersville, a regular station of said railroad, in said county of Fayette and State of Indiana, and were then and there engaged as common carriers, in the conveyance and transportation of passengers upon and along said railroad, to and from the said city of Hamilton, in the State of Ohio, to and from the said city of Indianapolis, in the State of Indiana, and to and from each railroad station upon and along said railroad between said cities of Hamilton and Indianapolis, for reward and hire; and the said plaintiff, having then and there purchased of and from said defendants at

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the city of Hamilton, and State of Ohio, first-class passage and fare for himself, his wife, and his three infant children, and secured tickets therefor from said defendants, entitling him, the said plaintiff, and his wife, Charity H. Chester, and his said children, viz.: Effie B. Chester, aged four years, Emory B. Chester, aged two years, and Ernest Chester, aged one year, to such first-class passage and fare over and upon said railroad of said defendants, from said city of Hamilton to said city of Connersville, got upon a regular passenger train of said defendants' cars on said road of said defendants, and into the hindmost car of said train, with his said wife and children, as passengers, to be by said defendants safely transported from said city of Hamilton to said city of Connersville, and while on said car as aforesaid, with his said wife and children, to be transported and carried as aforesaid, without any fault, carelessness or negligence on his part, or on the part of his said wife and children, or either of them, said car, in which he and his said family were then and there riding and being carried by said defendants, was, at the county of Union, and State of Indiana, by and through the fault, carelessness and negligence of the said defendants, their agents and employees, thrown with great violence from said railroad track, over and down an embankment of the height of twenty feet, causing great injuries to the body and person of said plaintiff, and to the body and person of his said wife, and to the body and person of each of his said children, to the great damage of the plaintiff, as follows, viz :

"1st. The said plaintiff's left thigh and left arm were broken, and his body otherwise bruised and cut, from which he has ever since suffered, and does still suffer, great bodily pain and mental anguish; that he is, in consequence of said injuries, permanently disabled and rendered unfit for any kind of business pursuit, or the comfortable enjoyment of life or limb; that, in addition to his said suffering and disabilities, he has been put to

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great expense for surgical and medical attendance, nursing, medicines, etc., in and about the attempted healing of said injuries, to the amount of five thousand dollars. Wherefore the plaintiff says, that, by reason of said injuries to his own body and person, received as aforesaid, by the fault, carelessness and negligence of the defendants, their agents and employees, and without any fault, carelessness or negligence on his part, he has sustained damages to the amount of thirty thousand dollars.

"2d. And the plaintiff further says, that at the same time and place, and by the same fault, carelessness and negligence of said defendants, and without any fault, carelessness or negligence on her part or on the part of the said plaintiff, his said wife, Charity H. Chester, received great bodily injuries, wounds and bruises in and upon her limbs and body, by reason whereof she has been and is permanently disabled and rendered incapable of discharging her duties to the plaintiff, as his wife; and he has thereby lost her services as such, and he has been compelled to expend large sums of money in and about the healing of said injuries. Wherefore the plaintiff says, that, in consequence of said injuries to his said wife, received as aforesaid, he has sustained damages in the further sum of five thousand dollars.

"3d. And the plaintiff further says, that at the same time and place, by the same fault, carelessness and negligence of said defendants, and without any fault, carelessness or negligence of the plaintiff or his child hereinafter named, viz., Emory B. Chester, said child, Emory B. Chester, son of the plaintiff, of the age of two years, received great and deadly injuries, wounds and bruises, from which he then and there died, without any fault of the plaintiff or other person or persons than the defendants, as aforesaid. Wherefore the plaintiff says he has sustained damages in the further sum of five thousand dollars.

"4th. And the plaintiff further says, that at the same

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time and place, by reason of the same fault, carelessness and negligence of the defendants, without any fault, carelessness or negligence of the plaintiff, or of his child hereinafter named, viz., Effie B. Chester, daughter of the plaintiff, of the age of four years, said child received great bodily injuries, wounds and bruises on the face and body, by means whereof said child is, and was, greatly disabled and disfigured, and suffered great bodily pain, and is thereby disfigured for life, without any fault or negligence of the plaintiff or any other person or persons other than the defendants as aforesaid; and the plaintiff says, that he has incurred great expense and labor in and about the healing of said child, to wit, to the amount of five hundred dollars, and by reason of said fault, carelessness and negligence of the defendants toward and in relation to said child, he has sustained damages in the further sum of five thousand dollars.

"Wherefore, in consideration of the premises and of the several causes of action in this complaint stated, the plaintiff demands judgment for fifty thousand dollars."

The defendants severed in their defence to this action, but as the jury, in their verdict, found for the defendant The Cincinnati, Hamilton and Indianapolis Railroad Company, and it had judgment in its favor, we shall notice only the several motions and pleadings of the appellant, in this opinion.

The appellant moved the court, in writing, for an order requiring the appellee to separate the different causes of action in his complaint into separate paragraphs, and number them respectively, thus:

"1st. All that relates to the injuries of Marion Chester in one paragraph;

"2d. All that relates to the injuries of Charity Chester in another and separate paragraph;

"3d. All that relates to the injuries of Emory B. Chester in another and separate paragraph;

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"4th. All that relates to the injuries of Effie B. Chester in another and separate paragraph;

"5th. All that relates to the injuries of Ernest Chester in another and separate paragraph."

This motion was overruled, and to this decision the appellant excepted; and the motion, decision and exception were made part of the record by a proper bill of exceptions.

Appellant also moved the court, in writing, to require the appellee to make his complaint more specific, definite and certain in regard to the charge of negligence and carelessness. This motion was also overruled, and to this decision the appellant excepted; and the motion, decision and exception were properly made part of the record by a bill of exceptions.

Appellant then demurred to appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled, and to this decision the appellant excepted.

And the appellant then answered by a general denial of each and every allegation in appellee's complaint.

And the action being at issue, on the appellant's application the venue thereof was changed from the said Fayette Circuit Court to the court below.

The cause was tried by a jury in the court below, and a verdict was returned in favor of the appellee, as against the appellant, assessing his damages at the sum of eighteen thousand dollars. Appellant moved the court below, in writing, for a new trial, which motion was overruled, and to this decision the appellant excepted. And judgment was rendered on the verdict, from which judgment this appeal is prosecuted.

In this court, the following alleged errors of the court below have been assigned by the appellant:

1st. In overruling appellant's motion for an order requiring the appellee to separate the different causes of

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action, stated in his complaint, into distinct and separate paragraphs;

2d. In overruling appellant's motion for an order requiring the appellee to make his complaint more specific, definite and certain in regard to the charge of negligence and carelessness;

3d. In overruling appellant's demurrer to appellee's complaint; and,

4th. In overruling appellant's motion for a new trial.

We will briefly consider some of the questions presented by these alleged errors, in the order of their assignment. And, first, did the court below err in overruling the appellant's motion for an order requiring the appellee to separate his complaint, or the different causes of action stated therein, into distinct and separate paragraphs?

It is very clear, we think, that the appellee's complaint in this cause does state at least two separate and distinct causes of action; but it is not so clear, that it states any more than two causes of action. It seems to us, that the appellee's alleged damages for his personal injuries, and the damages resulting from the injuries to his wife, whereby he lost her services, and the appellee's damages for expenses and labor in and about the healing of the injuries of his child Effie, all of which, as it was claimed, resulted from the same negligence and carelessness of the appellant, and enured to the appellee in his own personal right, might properly be sued for by the appellee in a complaint of but a single paragraph, as they would really constitute but a single cause of action. But the appellee has sued, in the same complaint of a single paragraph, for the recovery of damages for the death of his child, Emory B. Chester, from the alleged negligence and carelessness of the appellant. This cause of action is given by statute, and is separate and distinct from the other cause of action stated in appellee's complaint.

We are clearly of the opinion, that these two causes of

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action were improperly united in appellee's complaint. Even if these two causes of action had been stated in separate paragraphs, we think that they ought not to have been united in the same complaint, or in the same action. For the one paragraph would have stated a cause of action in favor of the appellee in his own right; while the other paragraph would have stated a cause of action in the appellee's favor, but for the benefit of the next of kin of his deceased child, Emory B. Chester.

It is true, that under section 27 of our practice act, the appellee might maintain an action in his own name for damages resulting from the death of his child, if occasioned, as alleged, by the wrongful act or omission of the appellant. 2 R. S. 1876, p. 44. But it is also true, that, under section 784 of the same act, the damages recovered in such an action "must inure to the exclusive benefit of the * * * next of kin, to be distributed in the same manner as personal property of the deceased." 2 R. S. 1876, p. 309.

It has been held by this court, and we think correctly, that these two sections of the practice act must "be construed together, and, as far as possible, effect must be given to the provisions of each." *The Pittsburgh, etc., R. W. Co. v. Vining's Adm'r*, 27 Ind. 513.

It is clear to our minds, that this alleged cause of action for the recovery of damages for the death of his child, in favor of the appellee as the father of the child, was improperly joined by the appellee with an alleged cause of action in his own right, for personal injuries to himself, in his complaint in this cause. And this would have been so, in our opinion, as we have already said, even if the two causes of action had been separately stated in separate and distinct paragraphs.

It does not follow, however, from the views we have expressed on this subject, that, in our opinion, any error was committed by the court below in overruling the appellant's motion for an order requiring the appellee to

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separate his complaint into paragraphs. This motion was in writing, and was an entirety; and from what we have said, it will be readily seen that the motion made was too broad, and did not reach the objection we have been considering to appellee's complaint. Our conclusion is, that no error was committed in overruling the appellant's motion to separate the appellee's complaint into separate paragraphs.

The appellant has also assigned, as an alleged error of the court below, the overruling of its written motion for an order requiring the appellee to make his complaint more specific, definite and certain, in regard to the charge of negligence and carelessness.

In our opinion, this motion was a proper one, made at the proper time, and should have been sustained. The general charge of the negligence and carelessness of the appellant was made and repeated, again and again, in appellee's complaint; but in no instance was this general charge predicated upon any alleged act of the appellant, either of commission or omission. What the appellant did, or omitted to do, of which it could be said that it was done, or omitted to be done, through the fault, negligence and carelessness of the appellant, the appellee has failed to allege in his complaint. Had the appellant negligently and carelessly constructed its line of railroad? Or had the appellant negligently and carelessly suffered its line of road to get and remain in bad repair and in an unsafe condition? Or, again, had the appellant's employees negligently and carelessly run its train of cars over its road? Or in what did the negligence and carelessness of the appellant consist, of which the appellee complained? The negligence and carelessness of the appellant were the gist of appellee's cause of action, and the rules of good pleading certainly required that the appellee should state in his complaint, with clearness and precision, the partic-

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ular acts of the appellant on which he predicated his charge of negligence and carelessness.

Chitty says: "A general statement of facts, in a complaint or answer, which will admit of almost any proof, is certainly bad pleading." 1 Chitty Pl. 232.

It was held by this court, in the case of *The Jeffersonville, etc., R. R. Co. v. Dunlap*, 29 Ind. 426, that, where negligence is pleaded, the particular act or omission must be stated. And, upon the subject we are now considering, this court said: "Certainly every rule of pleading which can be applied to the subject, while dispensing with the necessity of a prolix statement of the particulars constituting negligence, do require that the act which was characterized by negligence shall be stated." We fully approve of the doctrine of this case, and accordingly, in the case now before us, we hold that error was committed by the Fayette Circuit Court, in overruling the appellant's motion for an order requiring the appellee to make his complaint more specific, definite and certain in regard to his charge of the negligence and carelessness of the appellant.

The appellant's demurrer to the appellee's complaint was correctly overruled. There were facts alleged in the complaint, if they had been properly pleaded, sufficient to constitute several causes of action; and the improper pleading could not be reached by a demurrer to the complaint for the want of sufficient facts.

The remaining error assigned by the appellant was the overruling of its motion for a new trial.

We need not now consider any of the questions presented by this alleged error, as they relate chiefly to alleged errors of law occurring at the trial, which may not occur on a new trial of this cause.

The judgment of the court below is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellant's motion for an order re-

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quiring the appellee to make his complaint more specific in regard to the charge of the appellant's negligence, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

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67	307
144	413

DESCENTS, STATUTE OF.—*Section 7 Construed.*—*Widow.*—*Husband and Wife.*—

Partition.—Under the provisions of section 7 (1 R. S. 1876, p. 409,) of the act of May 14th, 1852, "regulating descents," etc., the widow of a husband who dies intestate and without children or their descendants alive is entitled to one-third, and the donor to two-thirds, in fee, of any real estate of which the husband dies seized, and which came to him by gift or conveyance in consideration of love and affection.

SAME.—*Proviso Construed.*—*Improvements made, and Money Expended, by*

Wife.—*Lien for.*—By the proviso of such section, it is intended that the widow of an intestate husband who has died seized of real estate so acquired shall hold a lien, not on a part, but on the whole, of such realty for the value of all improvements by her made, and for all money belonging to her separate estate by her expended in making improvements, thereon, prior to her husband's death.

From the Parke Circuit Court.

S. F. Maxwell and *S. D. Puett*, for appellant.

T. N. Rice and *J. T. Johnston*, for appellee.

HOWK, J.—The appellant, as plaintiff, sued the appellee, as defendant, in the court below, to obtain the partition of certain real estate in Parke county, Indiana.

In his complaint, the appellant alleged, in substance, that on or about the 23d day of December, 1851, for and in consideration of natural love and affection, and for no other consideration whatever, and as a gift, the appellant executed and delivered to his son, Francis M. Myers, then thirteen years old, a deed in fee-simple to the real estate in Parke county, Indiana, particularly described in said complaint, and containing one hundred and sixty acres;

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that, at the time said deed was executed, his said son resided with him, and had no estate, real or personal, and, from that time until his death, owned no other real estate except said real estate so given to him as aforesaid; that on or about the 20th day of August, 1868, the said Francis M. Myers married the appellee, with whom he lived until about the 15th day of February, 1872, when he died intestate and without issue, leaving the appellee surviving him as his widow; that said Francis M. Myers died seized of said real estate and held title thereto under and by virtue of the aforesaid deed, and none other; and the appellant alleged, that he and the appellee were tenants in common of said real estate; that he was the owner in fee of the undivided two-thirds thereof, and the appellee of the undivided one-third thereof; wherefore the appellant prayed judgment for partition, etc.

To this complaint, the appellee answered in three paragraphs, but as the only questions presented for our consideration in this cause arise upon the third paragraph, we need not specially notice the other two paragraphs of the answer.

In the third paragraph of her answer, the appellee alleged, in substance, that after the execution of the deed by the appellant to said Francis M. Myers, the said Francis M. Myers took possession of said land, which was then in a wild state, and cleared and fenced ninety acres of said land, and built two dwelling-houses, stables and out-houses, dug two wells on the same, planted an orchard, and otherwise improved said land; that, at the time of the death of said Francis M. Myers, the said improvements were, and still were, worth the sum of fifteen hundred dollars; that appellee was married to said Francis M. Myers at the time alleged in appellant's complaint, and that he died intestate and without issue or their descendants alive, on the — day of February, 1872; that appellee is his widow, and she asks that the said sum of fifteen hundred dollars may be declared a lien upon said land in

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her favor, the said sum being the value of the improvements made by said Francis M. Myers upon said land after the execution to him of said deed. Wherefore the appellee asked that said amount, the value of said improvements, might be taken into consideration in said partition, and for other relief.

Issue was joined by the appellant on this and the second paragraph of the appellee's answer, by a general denial thereof.

A trial by the court below resulted in a finding that the appellant was entitled to two-thirds, and the appellee to one-third, of the real estate in controversy, and in a further finding, that the appellee's husband, in his lifetime, made improvements on said real estate of the value of six hundred and seventy-five dollars. And the court below rendered judgment in favor of the appellee for said sum of six hundred and seventy-five dollars, and that the same should be declared a lien upon the land, which should be set off to the appellant by the commissioners appointed to make such partition. And commissioners were appointed by the court below to make partition of the said real estate, between the said parties, in accordance with the finding and judgment of the court.

Afterward, at the June term, 1873, of the court below, the commissioners reported a partition of said real estate, which was confirmed by the court. And the appellant, having given notice that he would take this case to this court on the third paragraph of the appellee's answer, it was ordered by the court below, that the clerk thereof certify to this court the complaint and the third paragraph of the appellee's answer, together with the rulings of the court below thereon.

The record of this cause and the appellant's assignment of errors thereon present for our consideration the proper construction of the 7th section of the statute of this State, entitled "An act regulating descents and the ap-

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portionment of estates," approved May 14th, 1852. This 7th section reads as follows:

"Sec. 7. An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living at the intestate's death, saving to the widow or widower, however, his or her rights therein: *Provided*, that the husband or wife of such intestate shall hold a lien upon such property for the value at the intestate's death, of all improvements by him or her made thereon, and for all moneys derived from the separate estates of such husband or wife expended in making such improvements." 1 R. S. 1876, p. 409.

It seems that there was no controversy in the court below, nor is there any in this court, as to the respective shares or rights of the appellant and the appellee in the real estate proper, of which the said Francis M. Myers was seized in fee-simple during his marriage with appellee, and at the time of his death. Indeed, there was, and is, no room for controversy on this point, under the admitted facts of this case. As surviving wife, the appellee was "entitled," under section 27 of our law of descents, to one-third of said real estate. 1 R. S. 1876, p. 418.

This was the right of the appellee in said real estate, not as an heir of said Francis M. Myers, deceased, but as his surviving wife. *May v. Fletcher*, 40 Ind. 575. This was the "right" which is expressly saved to the appellee as the widow of said decedent, under said section 7 of our descent law, in the real estate given to said Francis M. Myers by the appellant. And this right to one-third of said real estate being saved to the appellee as widow, the remaining two-thirds reverted to the appellant as the donor thereof, under the provisions of the said 7th section.

The real controversy between the parties to this suit is in relation to the improvements made on said real estate

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by said Francis M. Myers, prior to his death. There is no controversy, in this court, about the value of these improvements. But the questions for our consideration, as we understand them, may be thus stated :

1. Under the facts of this case, is the appellee, as the surviving wife of the intestate, entitled to the value, at the intestate's death, of all improvements by him made on said real estate ?

2. May the appellee, as the wife of said intestate, if she is entitled to the value of such improvements, hold a lien for such value and enforce the same against the appellant's share only of said real estate ?

The answers to these two questions depend entirely upon the construction which may be given to the proviso in the 7th section, before cited, of the act regulating descents.

The facts of this case, as they appear in the record, bring the case fairly within the terms of said proviso, and its construction is therefore necessary to the proper decision of this cause. The questions above stated, therefore, will be separately considered and decided.

1. The proviso is loosely and inaccurately worded, and in consequence is somewhat difficult of interpretation. In our opinion, however, as applicable to the case at bar, this proviso should be construed as if it read, that the wife of such intestate shall hold a lien upon such property for the value, at the intestate's death, of all improvements by *her*, and not by him, made thereon. This construction, it seems to us, is in harmony with, and gives some meaning to, the remainder of the proviso. For, if the proviso should be so construed as to provide that the wife of such intestate shall hold a lien upon such property for the value, at the intestate's death, of all improvements by him or her made thereon, there would be no sense whatever in the remainder of the proviso, which provides, as applied to this case, an additional lien in favor of the appellee for all moneys derived from her separate estate, ex-

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pended in making such improvements. If, in other words, the proviso gives the appellee a lien on the property in question for the value of all improvements made by him or her thereon, the remainder of the proviso must be regarded as inoperative and of no effect. For it can hardly be presumed that the Legislature intended, that, in such a case as this, the survivor should hold a lien for both the value of all improvements, and also for the survivor's money expended in making the same improvements.

It seems to us, that the true intent and meaning of this proviso, as applied to the case now before us, would give the appellee a lien on the property in question for the value, at her husband's death, of all improvements, if any, made by her on said property, and also for all moneys, if any, derived from her separate estate, expended in making improvements on said property. It was not alleged, however, in the third paragraph of appellee's answer, which was, properly speaking, a counter-claim or cross-complaint, that any improvements were made by the appellee on the land described in appellant's complaint, or that any moneys, derived from appellee's separate estate, were expended in making improvements on said land. On the contrary, it was expressly averred, in said third paragraph or counter-claim, that appellee's deceased husband had, in his lifetime, made all the improvements described in said paragraph or counter-claim, on the land in question. Indeed, it is manifest that appellee's third paragraph or counter-claim was prepared and filed in this cause, upon the mistaken theory that the appellee, under the facts of this case and by virtue of said proviso in said 7th section of the law of descents, held a lien upon said land for the value, at the death of her deceased husband, of all improvements by him made thereon. It is clear, therefore, to our minds, that the appellee's third paragraph or counter-claim did not state facts sufficient to constitute a cause of action, or to entitle the appellee to the relief therein sought for, and that the

finding of the court below thereon was contrary to law. The decisions of the court below on these points were made a part of the record of this cause by a special order of the court below, and their correctness is therefore fairly presented for our consideration.

2. The value of said improvements, as found by the court below, was declared, by the judgment of the court, "a lien upon the lands which shall be awarded the plaintiff by the commissioners herein." Practically, the question presented by this feature of the judgment is of but little importance in this case. It seems to us, however, that this part of the judgment of the court below is so manifestly erroneous, that we deem it our duty to point out briefly our objections thereto.

The law provided, as we have seen, that the appellee should "hold a lien upon such property" for the value of all improvements by her made thereon. The words "such property," as here used, evidently mean the property which came to the intestate "by gift or by conveyance, in consideration of love and affection," from his father, the appellant. The lien is given by law upon the entire property, and not upon a part or share thereof. Under the order of partition, in this case, the commissioners were directed to assign and set off to the appellant two-thirds of the land, "embracing improvements," and to the appellee one-third of the land, "not embracing improvements." It might possibly be, that, under such an order, no injustice would be done to either party. But the lien is given by the statute, and not by the judgment of the court; and, in such a case, it seems to us, that the court should merely enforce the lien, as given by the statute, against the property made subject to such lien.

The judgment is reversed, at the appellee's costs, and the cause is remanded for a new trial, and for further proceedings, in accordance with this opinion.

Christy v. Holmes.

CHRISTY v. HOLMES.

57	314
126	533
57	314
137	346
57	314
150	702

NEW TRIAL.—*Is the Verdict Supported by the Evidence?—Rule that should Govern the Circuit Court.*—A motion for a new trial, upon the alleged ground that the evidence is insufficient to support the verdict, should be granted by the circuit court, unless it clearly appears that substantial justice has been done.

SAME.—*Rule Governing the Supreme Court.*—Where the same question is presented to the Supreme Court, on appeal, that court should not grant a new trial, unless it clearly appears from the record that substantial justice has not been done.

From the Wells Circuit Court.

J. S. Dailey and L. Mock, for appellant.

BIDDLE, J.—Suit brought before a justice of the peace by Leander Holmes against Amos Christy, for the use and occupation of a certain house and grounds, under a special agreement, as is alleged, to pay five dollars per month rent.

Judgment for Holmes before the justice; appeal to the circuit court; trial by the court; finding and judgment the same way, and for the same amount.

Appeal to this court.

The appellant contends that the evidence is insufficient to support the finding. This is the only question he makes in his brief, and the only one we shall consider. The evidence on behalf of Holmes shows that he leased the house to Christy for five dollars per month, and that the premises were occupied by a third person with Christy's knowledge and consent. The evidence on behalf of Christy shows that the third person, who occupied the premises, leased the house from Holmes, and that Christy agreed to pay the rent if the occupant did not, but made no promise in writing, signed by himself, or by any person authorized to bind him. The evidence on either side is sufficient to prevail, if it stood uncontradicted by the other side. In such a case, it is very clear that we can not reverse the case.

Christy v. Holmes.

It should always be kept in mind, that the rule which governs a circuit court in deciding a motion for a new trial, upon the ground that the verdict is not sustained by sufficient evidence, is very different from the rule which governs the Supreme Court in deciding the same question, when brought before it by appeal. The circuit court presides over the case, knows with what ability or animus it is prosecuted or defended, has the jury and their conduct before it, sees the witnesses, their looks and manners, hears their statements, and knows whether willingly or reluctantly made; in short, sees the actual trial from its beginning and throughout its progress to the end, with all the indices of truth and falsehood before it, from all of which it may judge the question and decide.

An appellate court, which is merely a court of error, has nothing of the case before it except the record, in which the words of one witness mean just the same as the same words of another witness; when, perhaps, if the witnesses were seen while they testified, their manner noted, their living voices heard, their intelligence or ignorance of the subject about which they were testifying perceived, one might be entitled to full credit, and the other to not the least. And the living jurors, which come to us merely as so many names, are all before the circuit court, their intelligence or ignorance of the subject they are trying, their conduct or fairness as to prejudice or independence, and many signs of truth and falsehood which can not possibly be put into a record; and when the question has passed the ordeal of all these tests in the circuit court, and a new trial has been denied, the decision comes before us with so many presumptions in its favor that it is almost impossible to obtain a reversal of the judgment under the judicial rule by which we are bound. If, then, there is any evidence to support the verdict, we can not reverse the judgment, because we must suppose it was that evidence which convinced the

 Morris v. Thomas.

jury and the court, and the evidence which contradicted it was not credible, and therefore disregarded.

It sometimes appears to us that the circuit court ought to have granted a new trial, when we can not judicially reverse the case; and sometimes we fear that the circuit court follows the rule which governs the Supreme Court, instead of the rule which should govern the circuit court.

In the circuit court, it must clearly appear that substantial justice has been done by the verdict, or a new trial should be granted; in the Supreme Court, it must clearly appear that substantial justice has not been done, or the judgment should be affirmed. If each court will constantly remember the rule of law which governs it, and always put it into practical effect, then substantial justice will be done in every case.

The judgment is affirmed, with costs.

 MORRIS v. THOMAS.

57	316
126	180
57	316
166	117

CONTRACT.—Lease of Minerals.—Construction of.—Pleading.—Argumentative Denial.—A. and B., partners owning a coal-mine which they had leased to C., reserving to themselves as rent a certain royalty for each bushel of coal mined by the latter, entered into an agreement, in writing, whereby A. "turned over" to B. "his one-half of coal mined" under said lease "for the consideration of" a certain sum per bushel, "bank measure," as "royalty," payable in instalments.

Held, in an action by A. against B., to recover an amount alleged to be due as royalty, that the terms of such contract are clear and unambiguous.

Held, also, that an answer which merely alleges that a certain amount, less than that alleged in the complaint, was due to the plaintiff, and offering to allow judgment to be taken therefor, is insufficient on demurrer, and does not amount to an argumentative denial.

Held, also, that, where the terms of a contract are plain and unambiguous, conduct of the parties in carrying out its provisions, apparently not conforming thereto, can not, in an action upon it, be so pleaded as to give to it a construction different from that warranted by its own terms.

Morris v. Thomas.

From the Vanderburgh Circuit Court.

J. M. Shackelford and *R. D. Richardson*, for appellant.
C. Denby and *D. B. Kumler*, for appellee.

Howe, J.—The appellee, as plaintiff, sued the appellant, as defendant, in the court below.

In his complaint, the appellee alleged, in substance, that on the 1st day of January, 1874, he and the appellant were the owners of a certain coal-mine, situated on Green river, in the State of Kentucky; that, before that time, the appellee and appellant had, by their firm name of Thomas & Co., leased said mine to the firm of T. Shiver & Bros. for the term of three years, commencing July 5th, 1873, in consideration, among other things, that said T. Shiver & Bros. agreed to pay to said Thomas & Co. one-fourth of one cent for each and every bushel of coal that said Shiver & Bros. should mine in said coal-mine, a copy of which lease was filed with said complaint, by the terms of which lease said firm of Thomas & Co. had the refusal of all the coal that said Shiver & Bros. might mine in said mine; that on January 1st, 1874, in consideration, among other things, that appellee would and did turn over to the appellant his one-half of the coal that should be mined by said T. Shiver & Bros. at said mine, under said lease, the appellant, by his written agreement, a copy of which was filed with said complaint, promised the appellee that he would pay to appellee the sum of one-quarter of one cent for each and every bushel of coal that should be taken out of said mine; and the appellee said, that said agreement was subject to a condition, that Cassius C. Thomas & Bro. should not discontinue the sale of coal to river steamers, and, in fact, said Cassius C. Thomas & Bro. had not discontinued such sale, but then continued to sell the same to river steamers; and the appellee averred, that from and after April 1st, 1874, and until January 1st, 1875, there had been mined by said T. Shiver & Bros., in said mine, six hundred and fifty-seven thousand eight hundred and thirty-eight

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bushels of coal, on which the appellee was entitled to receive from the appellant, under said contract, in monthly payments, the sum of eight hundred and twenty-two dollars and thirty cents, being one-fourth of one cent per bushel on the half of said coal so mined, which sum the appellant, though often requested, has failed and refused to pay, as the same became due, and the same remained due and unpaid. Wherefore, etc.

To appellee's complaint, the appellant answered in a single paragraph, in which he alleged, in substance, that the appellee ought not to have or maintain his said action against the appellant, because, he said, that, from the date of said lease, to wit, July 5th, 1873, by the appellee and appellant, under their firm name of Thomas & Co., up to January 1st, 1874, the said firm of Thomas & Co. carried on the coal trade in the city of Evansville, Indiana; and, during the whole of said time, the said firm of Thomas & Co. took from said Shiver & Bros., of the coal mined by them at said mine, such quantities only as Thomas & Co. deemed necessary and proper for the carrying on of their said business in Evansville; and further, that, during the whole of said time, said Shiver & Bros. mined thousands of bushels of coal at said mine, in excess of that taken and required by said Thomas & Co. in their said business, which excess the said Shiver & Bros. sold and disposed of to other parties than said Thomas & Co., they paying to Thomas & Co. royalty on all the coal so mined by them at said mine, in accordance with the terms of said lease; that on January 1st, 1874, the appellant, by purchase, became the successor of Thomas & Co. in said business, and he was to carry on the business in the same manner that the firm of Thomas & Co. had done, the appellee simply turning over to the appellant his, the appellee's, one-half of the coal mined at said mine, and the appellee, by the terms of said contract, reserving and accepting his portion of the royalty that was to be paid by said Shiver & Bros.; that from and after January 1st, 1874, when the

Morris v. Thomas.

appellant became the successor of Thomas & Co., up to April 1st, 1874, he continued said business in the same manner that it had been carried on by said Thomas & Co., that is to say, he took, of the coal mined at said mine by said Shiver & Bros., such quantities only as the trade and business required; that the appellant paid, and appellee received from appellant, one-quarter of one cent per bushel on the one-half of the coal so taken and used by appellant in the said business, during January, February and March, 1874; and that, during said months, said Shiver & Bros. mined at said mine large quantities of coal, to wit, two hundred thousand bushels, in excess of that taken and used by appellant in said business, which excess Shiver & Bros. sold and disposed of to other parties than the appellant, which fact was well known to the appellee, and the appellee collected from said Shiver & Bros. his, the appellee's, portion of the royalty on the excess of coal mined at said mines, during said months, by said Shiver & Bros., just as the firm of Thomas & Co. had done prior to the time of the appellant's succeeding said firm in said business; that the excess of coal, to wit, two hundred and ten thousand four hundred and forty-six bushels, mined at said mine by said Shiver & Bros. between April 1st, 1874, and the time of the beginning of this suit, and not taken or used by appellant in his said trade and business, was, by said Shiver & Bros., sold and disposed of to other parties than the appellant, with the full knowledge, approbation and consent of both appellee and appellant, and with appellee's express authority to said Shiver & Bros. to so mine, sell and dispose of such excess of coal, by them mined at said mine, and not required or taken by appellant, to the parties and persons to whom the same was sold and delivered; that the appellee collected from said Shiver & Bros. his portion of the royalty on all the coal mined at said mine, just as he had done during the time that Thomas & Co. had carried on said trade and business, and as he had also

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done for three months after appellant succeeded to said business; that from January 1st, 1874, up to the time of the bringing of this suit, the said Shiver & Bros. mined only six hundred thousand four hundred and sixty-two bushels of coal, three hundred and ninety thousand and sixteen bushels of which the appellant had required, taken and used in his said business, on one-half of which there is due the appellee one-fourth of one cent per bushel, on, to wit, one hundred and ninety-five thousand and eight bushels, amounting in all to the sum of four hundred and eighty-seven dollars and two cents, which sum the appellant had ever been ready and willing to pay, and had, time and again, offered to pay; that is to say, at the end of each month he tendered to the appellee the full amount of money due him for coal taken and used by appellant in his said business, but the appellee refused to accept or receive the same; and the appellant, in and by his answer, offered and consented that judgment might be entered against him for the sum of four hundred and ninety dollars. Wherefore the appellant prayed, that his rights be protected, and for other proper relief.

To the appellant's answer the appellee demurred for the want of sufficient facts therein to constitute a defence to his action, which demurrer was sustained by the court below, and to this decision the appellant excepted. And the appellant refusing to answer further, by consent the cause was submitted for trial to the court below, without a jury, for the assessment of damages; and, upon the evidence, the court assessed the appellee's damages in the sum of eight hundred and sixteen dollars and seventy-five cents, and rendered judgment accordingly.

The only alleged error of the court below, assigned by the appellant in this court, is the sustaining of the appellee's demurrer to the appellant's answer.

It is difficult to determine, from the averments of the appellant's answer, what was the precise defence which

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the appellant intended to interpose to appellee's action. From the points made in argument by the appellant's learned attorneys in this court, we incline to the opinion that they also have been somewhat embarrassed with the same difficulty.

The first point thus made is, "that the answer is a good argumentative denial." An argumentative denial is seldom "good," in pleading, for any purpose; and we think we may fairly assume, that, when the answer was filed, it was not intended by appellant's counsel to be a denial, argumentative or otherwise, to appellee's complaint. The argumentative denial on which counsel rely is not a denial of appellee's cause of action, for that was the written agreement between the parties, which was made a part of the answer as well as of the complaint. The appellee had alleged in his complaint, as a fact, that Shiver & Bros. had mined six hundred and fifty-seven thousand eight hundred and thirty-eight bushels of coal; and this fact, it is claimed, the appellant had argumentatively denied, by simply alleging, in his answer, that Shiver & Bros. had only mined six hundred thousand four hundred and sixty-two bushels of coal. The appellant's argumentative denial hath this extent and no more,—the discrepancy between his statement and that of the appellee, as to the number of bushels of coal mined by Shiver & Bros.

It will readily be seen that the only effect of this argumentative denial, if such it may be termed, is merely to diminish the amount of appellee's recovery, and not to defeat his cause of action.

In our opinion, the appellant's first point is not well taken.

The second position assumed by appellant's attorneys, in argument, is thus stated in their own language:

"That the answer sets up the only proper and just construction of the agreement entered into between the par-

Morris v. Thomas.

ties,—that placed upon the instrument by the parties themselves.”

In the agreement referred to, the appellee was “the party of the first part,” and the appellant was “the party of the second part.”

The clause of this agreement, of which the appellant undertook, in his answer, to give “the only proper and just construction,” was in these words :

“It is further agreed between the aforesaid parties, as they own a coal-mine at or near Spottsville, (Ky., on Green river,) Ky., that the party of the first part turns over to the party of the second part, his one-half of coal mined at the aforesaid, for the consideration of one quarter of one cent per bushel, for lump coal and nut coal, royalty, bank measure, to be paid monthly by the party of the second part of this agreement to the party of the first part.”

There is no room, it seems to us, in the phraseology or verbiage of this clause, for construction or interpretation. It is plain, certain, and free from ambiguity. It contains not a word or expression of doubtful or indefinite meaning. There is but one technical word in the entire clause, and the meaning of that word is fixed and made certain by means of its context. If there was any obscurity, uncertainty or ambiguity in the terms of this contract, then the acts of the parties in connection therewith, as suggested by appellant’s counsel, would furnish valuable aid in the construction of the contract. But where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case, it is certainly not the province of the courts, by any rules of construction, to make another and entirely different contract for the parties from the one they made for themselves.

We think, therefore, that appellant’s second point is not well taken, and that his rule of construction, and his

authorities in support of it, are not applicable to the case now before us.

In our opinion, no error was committed by the court below, in sustaining the appellee's demurrer to the appellant's answer.

The judgment of the court below is affirmed, at the appellant's costs.

CONN v. CONN.

57 323
141 307

DIVORCE.—Custody of Child.—Allowance for Support.—It is not imperative upon the court, in an action for divorce, where the custody of a minor child of the parties is granted to the wife, to decree an allowance to the wife, from the husband, for its support.

SAME.—Obligation of Father.—Liability for Necessaries.—The rendition of a decree of divorce in favor of the wife, and the granting to her of the custody of minor children of the parties, do not relieve the husband of his obligation to provide means for their support and education.

SAME.—The father has the legal right to the custody of his children, unless it be clearly shown that he is unfit for, or grossly at fault in, its exercise.

SAME.—Alimony.—Discretion of Court.—Supreme Court.—The discretion of the circuit court as to the amount of alimony to be allowed to the wife, on granting her a decree of divorce, will not be revised by the Supreme Court on appeal, unless exercised indiscreetly.

From the Cass Circuit Court.

D. P. Baldwin and *M. Winfield*, for appellant.

S. T. McConnell, for appellee.

BIDDLE, J.—The appellant filed her petition for divorce, against the appellee.

The appellee answered, and filed a cross-petition.

The court decreed the divorce on the original petition, allowed the appellant two thousand dollars alimony, two hundred and fifty dollars to pay attorney fees, and fifty dollars allowance to enable her to prosecute her suit, making in all two thousand three hundred dollars. The

Conn v. Conn.

court also decreed the custody of two of their children, Emma Conn, aged seven years, and Anna E. Conn, aged two years, to their mother, the appellant; and the custody of George Conn, aged nineteen years, Mary Jane Conn, aged sixteen years, Ellen Conn, aged thirteen years, and Robert M. Conn, aged ten years, to their father, the appellee.

An appeal from this decree is brought to this court.

The appellant raised several questions in the record, but discusses in his brief only three:

1. The alleged error of the court in refusing to make an allowance for the care and support of the minor children, Emma Conn and Anna E. Conn, committed to the custody of the appellant;

2. The alleged error of the court in refusing to give the custody of Mary Jane Conn, Ellen Conn and Robert M. Conn to the appellant, and granting such custody to the appellee; and,

3. The insufficiency of the amount of alimony allowed.

1. The appellant, in support of the first question, insists, that, in giving the custody of the minor children to the appellant, it became the imperative duty of the court to make an allowance to the appellant for their care and support, independent of the amount granted as alimony. Section 20 of the divorce act (2 R. S. 1876, p. 331,) enacts, that "The court shall make such decree for alimony in all cases contemplated by this act, as the circumstances of the case shall render just and proper," etc.

Section 21 enacts, that "The court in decreeing a divorce shall make provision for the guardianship, custody, support, and education of the minor children of such marriage."

It is a familiar legal principle, that all parts of an act must be so construed as to harmonize with one another.

Granting alimony is discretionary in the court, as the circumstances of the case shall render just and proper;

and we think it would be anomalous to hold, that granting an allowance for the support of minor children was imperative upon the court, under all circumstances. That there might be a case—as where a father had means at his command and had denied his minor children support, protection, care or education, and was squandering his means which should be used in such support, protection, care and education—in which it would become the court's imperative duty to make such allowance, we doubt not; but the facts before us make no such a case.

The evidence shows that the appellee is a farmer, an industrious, saving, money-getting man. It does not show any unwillingness on his part to support and educate his minor children, nor that he is unfitted for the discharge of such duties reasonably, according to his circumstances. The decree does not deny the right of the children to be supported and educated by their father, nor is he absolved from such obligation by the decree. Such right and obligation are the same as though no divorce had been decreed, or the custody of the children had not been given to the mother. Besides, the discretionary power of the lower court must have been clearly abused to authorize an appellate court to revise it. In this case, we cannot say that such power was improperly exercised.

In the case cited by the appellant, *Bush v. Bush*, 37 Ind. 164, the question was not one of making an allowance, but of the custody of the children, and therefore does not support his view.

2. As to the second question, we think the custody of the older children was properly given to the appellee. The father has the legal right to the custody of his children, unless it is clearly shown that he is unfit to discharge his duty toward them, or is grossly at fault in its exercise. He is charged with the obligation of their support and education, and he must be allowed to do it in his own way, unless there are strong reasons for the law

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to interfere with his right. No such reasons have been shown in this case.

3. The evidence shows, that the appellee was the owner, at the time of the decree, of real estate of the value of about nine thousand dollars, and of personal property of the value of about one thousand or fifteen hundred dollars, accumulated by the labor and prudence of both parties during twenty years. Upon this basis, we can not say, as an appellate court, that the allowances made by the court below were insufficient in amount. Perhaps the facts would have warranted a larger amount, but we can not safely say that there was any indiscreet exercise of power by the lower court. *Garner v. Garner*, 38 Ind. 139; *Ryce v. Ryce*, 52 Ind. 64; *Powell v. Powell*, 53 Ind. 513.

The judgment is affirmed, with costs.

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Gadsbury.

BUNNELL ET AL. v. BARIKLOW.

From the Montgomery Circuit Court.

G. W. Paul and *J. E. Evans*, for appellants.

W. P. Britton and *M. W. Bruner*, for appellee.

Howk, J.—Appellee, as payee, sued the appellants, as makers, of a promissory note, in the court below, which note was alleged to be due and unpaid. The appellants answered affirmatively, admitting the execution of the note sued on, and setting up certain alleged equitable defences thereto. On demurrer, the court below held these answers to be good defences to the action. These answers are very long, and it would be unprofitable, we think, to set them out in this opinion. Appellee replied by general denial. The issues joined were tried by a jury, in the court below, and a verdict was returned for the appellee for the amount due on the note.

The appellant James Bunnell separately moved the court below in writing for a new trial; this motion was overruled by the court, and to this decision said Bunnell excepted. And judgment was then rendered upon the verdict by the court below.

In this court, the only alleged error, assigned by appellant James Bunnell, is, that the court below erred in overruling his motion for a new trial. And the only causes for such new trial, assigned in said motion, were, that the verdict was not sustained by sufficient evidence, and that it was contrary to law.

But a single enquiry, therefore, is presented for our consideration in this cause: Was there any sufficient, legal evidence before the jury tending to sustain their verdict? We think there was.

The judgment of the court below is therefore affirmed, at the costs of the appellant James Bunnell.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS R. W. Co. v.
GADSBURY.

From the Blackford Circuit Court.

N. O. Ross, for appellant.

J. T. Wells, for appellee.

WORDEN, J.—The question involved in this case is the same as that decided in the case of *The Pittsburgh, etc., R. W. Co. v. Bolner*, post, p. 572, and for the reasons therein given the judgment below must be reversed.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

Aitkins v. Shanks, Treasurer.

AITKINS v. SHANKS, TREASURER.

From the Clinton Circuit Court.

R. P. Davidson and *J. C. Davidson*, for appellant.

J. Claybaugh, *L. McClurg* and *J. V. Kent*, for appellee.

PERKINS, C. J.—This case presents for decision the same question as that decided in *Pay v. Shanks*, 56 Ind. 554; and the judgment in this is affirmed on the authority of that case.

Affirmed, with costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1877, IN THE SIXTY-
SECOND YEAR OF THE STATE.

57	339
180	430
57	329
148	681
151	82

LATTA v. GRIFFITH.

AMENDMENT.—Of Judgment.—Motion to Amend not Demurrable.—Assignment of Error.—A complaint to correct the amount of a judgment should be regarded as a mere motion for that purpose, and is not subject to be tested by demurrer, nor, on appeal to the Supreme Court, by an assignment of error that it is insufficient.

SAME.—Jurisdiction.—Power of Court.—Where, in such case, a complaint in the ordinary form has been filed in the court in which the judgment was rendered, alleging the nature and amount of the mistake, such court has jurisdiction of the subject-matter, and power to make the proper correction.

SAME.—Reasonable Notice.—Default.—Where notice of such proceeding is given to the defendant, by service of summons in a county adjoining that wherein such action is pending, four days prior to the term at which it is to be heard, such notice is reasonable, and gives to the court jurisdiction of his person, and if he fail to appear he may be defaulted.

From the Rush Circuit Court.

B. F. Davis and *R. A. Black*, for appellant.

G. C. Clark, *J. T. Dye* and *A. C. Harris*, for appellee.

WORDEN, J.—Griffith held a note against Latta for four

Latta v. Griffith.

hundred and eighteen dollars and fifty cents, and placed it in the hands of an attorney for collection, who commenced suit thereon; but in the complaint he described the note, by mistake, as being for two hundred and eighteen dollars and fifty cents, instead of the true amount.

At the May term, 1873, of the court below, judgment was rendered in favor of Griffith, against Latta, for the amount due on the note, supposing it to have been given for two hundred and eighteen dollars and fifty cents, the mistake in the complaint leading to a mistake in the amount for which judgment was rendered. The note or a copy thereof, we may assume, was filed in that action.

Afterward, Griffith filed his complaint, or motion, in the court below, to correct the mistake in the amount for which the judgment was rendered.

A summons was issued in the case, and served on the defendant, Latta, by the sheriff of Marion county, on December 11th, 1873, requiring him to appear and answer the complaint on the second day of the next term of the court, to be held on the third Monday of December, 1873.

Afterward, on January 8th, 1874, the defendant not appearing, he was defaulted, and the court proceeded to hear the cause, and made the correction.

It is assigned for error:

1st. That the court below had no jurisdiction over the subject-matter of the action;

2d. The court below had no jurisdiction over the person of the defendant below; and,

3d. The complaint does not state facts sufficient to constitute a cause of action.

We are of opinion, that the paper styled a complaint should be regarded as a mere written motion, not to be tested by demurrer, nor subject to an assignment of error that it does not state facts sufficient. *Jenkins v. Long*, 23 Ind. 460; *Bales v. Brown*, ante, p. 282.

Farley v. The State.

This disposes of the third assignment of error.

As to the first, that the court had no jurisdiction over the subject-matter, we are of opinion that the court had such jurisdiction. That the court had jurisdiction to correct such mistakes, see the cases above cited; also, *Sherman v. Nixon*, 37 Ind. 153.

We are of opinion, also, that the court had jurisdiction over the defendant below.

The correction could only be properly made in the court where the mistake was committed, and the defendant was bound to answer the motion to correct in that court, or let the matter go by default. The summons served on the defendant may be regarded as a notice. *Jenkins v. Long, supra*. It was served on December 11th, and the court commenced, we believe, on the 15th. The defendant was required to appear on the second day of the term. This made four days, excluding both the day of the service and the day the defendant was required to appear.

This, it seems to us, gave the defendant ample time to make all needful preparations, and to go from Marion to Rush county.

There is no error in the record.

The judgment below is affirmed, with costs.

FARLEY v. THE STATE.

CRIMINAL LAW.—*Evidence.—Impeaching Witness.*—Where no evidence has been introduced in support of the general moral character of the defendant in a criminal cause, it is error to allow counsel for the State, in cross-examining the defendant while testifying as a witness, to ask him whether he had ever been convicted of a crime.

SAME.—A witness in a criminal prosecution can not be impeached by evidence as to his general moral character.

Farley v. The State.

SAME.—Parol Evidence of Record.—A judgment of conviction of a crime can not be established by parol evidence.

SAME.—Larceny.—Receiving Stolen Goods.—Evidence.—On the trial of a defendant indicted for the larceny of a chattel, and for receiving such chattel feloniously, it is error to exclude a bill of sale of the chattel, executed to the defendant by another, offered in evidence by the defendant.

SAME.—Recalling Jury.—Additional Instructions to Jury.—At the request of the jury trying a criminal cause, the court may recall and give them additional instructions, after they have retired to agree upon a verdict.

From the Hamilton Circuit Court.

J. Stafford, for appellant.

C. A. Buskirk, Attorney General, for the State.

Howe, J.—An indictment, in two counts, was returned into the court below, against the appellant and one Samuel Cook.

The first count charged the appellant and said Cook with grand larceny, in stealing a bay horse of the value of eighty dollars, the personal property of one Elizabeth Dawson; and the second count charged them with having feloniously bought, received and concealed a bay horse, of the same value, and the property of the same person.

On arraignment, appellant's plea to said indictment was not guilty.

The cause was tried by a jury in the court below, and a verdict was returned, finding the appellant guilty of grand larceny as charged, and assessing his punishment at two years' imprisonment in the state-prison, a fine of twenty dollars, and disfranchisement, etc., for the term of three years.

The appellant's written motion for a new trial having been overruled, and his exception saved to such decision, judgment was rendered by the court below on the verdict.

In this court, the only alleged error of the court below, assigned by the appellant, is the overruling of his motion for a new trial.

In his motion for a new trial, the appellant assigned the following causes:

Farley v. The State.

1. The verdict of the jury was contrary to law;
2. The verdict of the jury was contrary to the evidence;
3. The court below erred in permitting the appellee to prove by the appellant, on cross-examination, over the appellant's objection, that the appellant had theretofore been sent to the penitentiary for forgery;
4. The court below erred in excluding as evidence, in said cause, a bill of sale of the horse alleged to have been stolen, which bill of sale the appellant proved, by his own testimony, he had received from one Samuel Cook; and,
5. The court below erred in recalling the jury from their room, after they had retired to consider of their verdict, and after they had been instructed by the court, and in giving them additional instructions, in the absence of the appellant's counsel.

It appears from the bill of exceptions in the record, that the appellant was a witness on the trial in his own behalf. After he had testified in chief, the prosecuting attorney, on the cross-examination of the appellant, asked him the following questions:

"Have you not been convicted of stealing horses before, and sent to the penitentiary?"

To which question the appellant objected, because the same was irrelevant and immaterial in any event, and was not proper cross-examination; but the court below overruled the objection, and required the appellant to answer the question, and to this decision the appellant excepted.

This question was answered in the negative, and then the prosecuting attorney asked the appellant the following question:

"Have you not been convicted of some other crime, and sent to the penitentiary?"

And to this question the appellant objected, for the reason that the same was irrelevant, immaterial and improper in any event, and not proper cross-examination; which objection the court below overruled, and required

Farley v. The State.

the appellant to answer the question; and the appellant excepted to this decision.

Appellant's answer to this question was, "Yes sir; for complicity in forgery."

It is very clear, we think, that the court below erred in each of these decisions.

The appellant, on the trial in the court below, had offered no evidence in support of his general good character, and therefore the State ought not to have been permitted to introduce evidence for the purpose of impeaching his good character as the defendant in the cause.

And, for the purpose of impeaching the appellant as a witness in the case, the evidence introduced was clearly incompetent, "for the reason that in a criminal cause a witness can not be impeached or sustained by proof of general moral character," and much less so by proof of an isolated act of good or bad conduct. *Fletcher v. The State*, 49 Ind. 124.

It is evident that the object of the evidence, sought for by the answers to the above recited questions, was to impeach the credit of the appellant as a witness before the jury trying the cause, not by proof of his bad character for truth, but by proof of his former conviction and punishment for another crime.

In our opinion, the evidence thus introduced was not relevant to the issues in this case, and was not competent for any purpose.

If, however, the fact of a former conviction was material, yet the evidence offered by the State to prove such conviction was clearly incompetent. "Where the question involves the fact of a previous conviction, it ought not to be asked; because there is higher and better evidence which ought to be offered." 1 Greenl. Ev., seq. 457. So that, in any view of the matter, it is a clear proposition, we think, that the court below erred in overruling the appellant's objections to the above recited questions, and in requiring the appellant to answer those questions.

The Town of Noblesville v. McFarland.

It seems to us, also, that the court below erred in excluding from the jury the bill of sale to the appellant of the horse which he was charged with having stolen. The appellant proved the execution of the bill of sale by one Samuel Cook, and then offered it in evidence.

We think this evidence was competent as tending to sustain the appellant's defence; and it was for the jury to determine what weight, if any, the evidence was entitled to, under all the circumstances.

We think it was competent for the court below, in its discretion, to recall the jury from their room, if they requested it, and to give them additional instruction. The record fails to show that the appellant was prejudiced in any manner by the action of the court below in this regard, or by the absence of his counsel during such action.

For the reasons given, however, our conclusion is, that the court below erred in overruling the appellant's motion for a new trial of this cause.

The judgment of the court below is reversed, and the cause is remanded, with instructions to sustain the appellant's motion for a new trial, and for further proceedings; and the clerk of this court will notify the warden of the proper prison to return the appellant to the custody of the sheriff of Hamilton county.

THE TOWN OF NOBLESVILLE v. MCFARLAND.

TOWNS.—*School Corporation.—Pleading.*—The character in which an incorporated town may sue or be sued as a school corporation may be designated, either in the title of the action, as a school corporation, or in the complaint by an allegation of that fact.

From the Hamilton Circuit Court.

D. Moss and T. J. Kane, for appellant.

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1133 286

57 335
155 208

The Town of Noblesville v. McFarland.

W. Garver, for appellee.

PERKINS, J.—Suit by Julia A. McFarland against The Town of Noblesville, upon the following complaint:

“The plaintiff complains of the defendant, and says, that said defendant is a school corporation, duly organized under and pursuant to the laws of the State of Indiana, by the corporate name of The Town of Noblesville. And she further says, that, on the 22d day of December, 1871, at said town of Noblesville, she was employed by Leonard Wild, Eb. M. Morrison and John Stevenson, who were then and there acting as, and who then and there composed, the board of school trustees for said corporation. Which said employment, she avers, was then and there made with her by one James Baldwin, who then and there was the superintendent of the public schools of said corporation, and who then and there was acting as, and was, the agent of said corporation, for the purpose of employing this plaintiff. And the plaintiff avers, that by said Baldwin, the agent of said trustees as aforesaid, she was employed to teach in one of the grades of the school of said town, known as the high school of said town, for the sum of three dollars and twenty-five cents per day; that her agreement and contract with said James Baldwin, as agent of said board of school trustees, was to teach said school from date last aforesaid, to wit, the 22d day of December, 1871, until the end of the school year in which they were then engaged, which, as she was informed by said Baldwin, would end, and which, in fact, did end, on the 27th day of June, 1872; and that the employment of the plaintiff by said Baldwin was, at the time, ratified and confirmed by said board of trustees.

“And the plaintiff avers, that, at the time she was employed by the said board of school trustees of said town as aforesaid, she was, by profession and occupation, a school-teacher, and had, at the time, the necessary license and certificate from the examiner of said Hamilton county, Indiana; that, in pursuance of said agreement

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and contract so made with said board of school trustees as aforesaid, she immediately entered upon her duties as teacher in said high school, in which position she continued until the 25th day of March, 1872, when she was informed by said board of trustees that her services were not longer wanted in said high school, and that she would not be permitted to teach in said school any further. And she avers, that said board of trustees brought against her no charge or accusation of any failure or wrong upon her part, but, without any cause whatever, unlawfully violated said contract and agreement, as aforesaid.

“And she further avers, that the date upon which she was dismissed from said school, as aforesaid, was at a season of the year when she could not obtain employment in her said profession elsewhere, and that she was compelled to, and did, lose from her said business all of the time from the date of her discharge as aforesaid, until the end of said school year, as aforesaid; and that, notwithstanding the foregoing contract of said board of trustees in dismissing her, as aforesaid, she continued to hold herself in readiness to teach, as directed by the board of school trustees, so far as they were in consonance with the terms of her said contract, and was ever in such readiness until the expiration of the school year for which she was employed; that she has received for her services the sum of one hundred and fifty dollars, leaving due and unpaid the sum of two hundred dollars, with the interest thereon since the close of said term as aforesaid, which sum she has demanded of the defendant, and which sum defendant refuses to pay.”

Demurrer to the complaint, for want of sufficient facts, overruled, and exception taken.

Answer. Reply. Trial by jury; verdict for plaintiff. Motion for a new trial overruled; exception, and judgment on the verdict.

The errors assigned in this court, upon appeal, are:

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1st. The court erred in overruling appellant's demurrer to the complaint; and,

2d. The court erred in overruling appellant's motion for a new trial.

We think the complaint is good. It shows very clearly, by its allegations and averments, that "The Town of Noblesville" is sued in its character of a school corporation. "The Town of Noblesville" is the name of the civil corporation, and the statute declares that every such incorporated town shall be a "municipal corporation for school purposes, by the name and style of the civil * * town, * * * and by such name may contract and be contracted with," etc. Sec. 4, 1 R. S. 1876, p. 780. But it is necessary in contracting, and in suing and being sued, that the character in which it is acting and being acted upon should be shown. The above section of the statute, it may be observed, is the one governing this case. *McLaughlin v. Shelby Township*, 52 Ind. 114.

There are, we think, two modes in which this character, as above mentioned, may be shown: 1. By designating the character, by prefixing an adjective to the name, as "The School Town of Noblesville;" 2. By averments in the complaint, such as are made in this, that it contracted, and is suing or being sued, in its character of a school corporation, by its corporate name. In such case, the judgment and its execution would follow the averments in the complaint and be governed thereby.

The cases in our reports authorize the inference that either of the modes we have suggested will suffice. In addition to the one cited above, see *Jackson Township v. Barnes*, 55 Ind. 136; *The City of Huntington v. Day*, 55 Ind. 7.

The case is very like that of *The City of Crawfordsville v. Hays*, 42 Ind. 200.

Appellants, in their brief, have not pointed out specifically a single objection to the rulings of the court below.

Goar *et al.* v. Maranda *et al.*

The judgment is affirmed, with five per cent. damages and costs, as due against the school town, and to be collected from its funds.

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57	350
140	441

JUDGMENT.—*Can not be Attacked Collaterally.*—*Process.*—*Evidence.*—Though the record of a judgment offered as evidence in a cause fails to show that the judgment defendant had been served with summons, yet it can not be attacked collaterally.

From the Tipton Circuit Court.

J. W. Robinson, for appellants.

J. Green, D. Waugh and J. Waugh, for appellees.

BIDDLE, C. J.—George Maranda sued Matt F. Goar and seventy-nine others, members of The Union Draining Association, to hold them liable personally for the payment of a judgment which he had recovered against the association.

Judgment was rendered against the appellees upon trial.

We need not state the proceedings any more particularly, as the following are the only assignments of error:

"1. The complaint is fatally defective, no copy of the articles of association being filed with the complaint, as therein alleged;

"2. The court erred in defaulting the appellants without evidence of a summons issued and served;

"3. The court erred in rendering final judgment against appellants upon an insufficient complaint; and,

"4. The complaint in the court below does not contain facts sufficient to constitute a cause of action."

The first, third and fourth assignments of error go to the sufficiency of the complaint, and the only objection alleged against it is, that a copy of the articles of associa-

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tion, upon which the corporation was organized, was not filed with it as an exhibit. Without deciding that such an exhibit was necessary in a case of this kind, it is enough to say, that, although the transcript, when originally filed in this court, did not show such an exhibit, yet by a return to a *certiorari*, made by the clerk below, it appears that the articles of association were filed as an exhibit with the complaint.

The second assignment of error does not exist in the record, in point of fact. There was no judgment by default in this case. The appellees answered, and judgment was rendered against them upon trial. It appears, however, that the judgment before recovered by Maranda against The Union Draining Company, and made an exhibit in this case, was rendered upon a default; and, by the transcript of that record, it does not appear that the summons and service upon it were made a part of the record; but it does appear that the plaintiff therein proved "to the court that a summons, issued out of this court, in this case, was served on the defendants more than ten days before the first day of the present term of this court." From this judgment no appeal was taken.

Admitting that it was erroneous and might have been reversed, on appeal, yet it is not a nullity, and can not be attacked collaterally. *Evans v. Ashby*, 22 Ind. 15; *Waltz v. Borroway*, 25 Ind. 380; *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66; *Comparet v. Hanna*, 34 Ind. 74; *Gavin v. Graydon*, 41 Ind. 559; *Britton v. The State, ex rel., etc.*, 54 Ind. 235.

We have thus disposed of all the assignments of error.

The judgment below is correct, and is therefore affirmed, with costs.

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HUBER v. THE STATE.

CRIMINAL LAW.—*Larceny.—Obtaining Chattel by Fraud.*—Where a person obtains possession of a chattel from the owner, by a fraudulent trick or contrivance, with intent to steal, though with the consent of the latter, he is guilty of larceny.

57 341
148 407

SAME.—*Instruction to Jury.*—On the trial of a defendant indicted for larceny, the court instructed the jury, that they should not convict the defendant, unless the State had proved that the defendant had stolen some part of the property described in the indictment, "that the property stolen was of some value," and, "if stolen, was the property of" the prosecuting witness, and that "the act of stealing" had been "committed in this county within two years prior to the finding of the indictment."

Held, that the instruction is not erroneous.

SAME.—*Comments of Counsel.—Credibility of Witness.—Appearance of Defendant.*—It is not error, that the prosecuting attorney, on the trial of a criminal prosecution wherein the defendant has testified as a witness in his own behalf, in commenting on the credibility of the defendant, was allowed to refer to the appearance of the countenance of the latter while testifying, though abstractly such comments would be improper.

From the Wayne Circuit Court.

S. A. Forkner, for appellant.

C. A. Buskirk, Attorney General, and *H. U. Johnson*, Prosecuting Attorney, for the State.

NIBLACK, J.—The appellant, Joseph Huber, was indicted in the court below, jointly with Charles Miller, for grand larceny.

The charge was, that they had stolen fifty dollars, in United States treasury notes and national bank currency, from one Joseph Walters.

There was a trial by a jury, a verdict of guilty, fixing the punishment at five years in the state-prison, with a fine and disfranchisement, and judgment on the verdict, over a motion for a new trial.

The causes assigned for a new trial were:

1. Because the verdict is not sustained by the evidence;
2. Because the verdict is contrary to the evidence;
3. Because the verdict is contrary to law;

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4. That the court erred in giving instructions from one to twenty; and,

5. That the court erred in permitting the prosecuting attorney to make certain remarks in regard to the countenance of the defendant being evidence of his guilt.

The only error assigned is the overruling of the motion for a new trial, which calls in question the sufficiency of the evidence to sustain the verdict, the correctness of the charges of the court, and the remarks of the prosecuting attorney.

On the trial, Joseph Walters testified on behalf of the State, in substance, as follows:

"The defendant got some money of me March 1st, 1877, in Richmond, Wayne county, Indiana. He got fifty dollars. It was my own money. I was walking in the street, running east and west, right south of the depot in Richmond, on that day, waiting for some household goods to come to the depot in a wagon. These goods I was going to ship to Iowa. They were my son-in-law's. The defendant came up to me there. He spoke to me first, and said, 'Grandpap, this is a nice city you have here.' I said, 'Yes; but I do not live here. I live in Eaton, Ohio, and am waiting here for some goods of my son-in-law's to come. I am going to ship them to Iowa. My son-in-law is moving out there.' I told him I was going to Iowa. He said he was agent of one of the most extensive clothing establishments in the United States, located in California. I think he said in San Francisco, but am not sure as to that. He also said that he was establishing agencies to sell their cloth by samples, and asked me how I would like to become an agent for him. I said, 'That is entirely out of my line of business.' He then said he had established agencies at Indianapolis, Connersville, Cambridge City, Newcastle, and other points. I told him I had no time to attend to the business. He said it would not take much time; that I could simply leave a few samples as I went through Chicago, (I told him I was going

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through Chicago,) and at the places I stopped at in Iowa; that the goods were marked very low, and would recommend themselves. I still told him I did not believe I could attend to it; that I had a son-in-law who kept store in Eaton, and I would take some of his samples over there. He then said, 'I'll tell you what I'll do: You look like an honest man, and I'll do by you as I have done by other agents. If you will take some of our samples and leave them at Chicago, and show them in Iowa where you are going, I'll give you fifty dollars in advance.' He then took some large pieces from his pocket that looked like gold." (Spiel marks here handed to the witness.) "These look like the pieces he pulled out. They are of the same size, but are not quite so light as they were then. As he pulled these out, the defendant said, 'Here are five twenty-dollar gold pieces, fresh from the mint. If you will act as our agent, I will give you these, and you can give me fifty dollars in greenbacks, as I need some paper money. I have not got any greenbacks.' He said that their chief object was to introduce their goods. He said the samples were at the hotel, and asked me to go over there and see them. I told him I only had a few minutes' time and would go over, but would have to be quick, as I was expecting the wagon every minute. We went across to the Avenue House and went up stairs to a room. He led the way. When we went into the room, there was no one else there. There was a table there, and I saw lots of these samples of cloth I see here spread out on the table. They were marked. I saw this valise there, lying on the end of the table. I think this box containing envelopes was in the valise. I saw it there. I examined the samples on the table; defendant also looked at them with me. He said he thought I could make money out of it. I still said I believed I could not go into the arrangement. Then he said, 'I will also make you a present of a suit of clothes if you do. You may pick out the cloth from the samples, and, whatever you pick out, I will give you a suit

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of clothes like it.' Just then the other man, Miller, came in. He said, 'I guess I am in the wrong room.' The defendant said, 'Oh, no; we like to see people here. I am just showing the old gentleman the cloth, and can show you at the same time.' Huber then asked Miller if he lived in the city. Miller said no, he lived in Iowa. Huber then said that I was going to Iowa, and Miller asked me what part of Iowa I was going to, and I said to Des Moines. Huber then told this man Miller what his proposition was, and that he wanted me to act as his agent, and had offered me fifty dollars. Miller then examined the cloth and said it was very nice. He took out his pocket-book and said he wished he had fifty dollars, but said he only had seven or eight dollars—I do not remember which he said. Huber again took out the gold and said, 'You give me fifty dollars in greenbacks, and I will give you this one hundred dollars in gold.' The other man then went on looking at the samples. I was sitting at the side of the table in a chair. The defendant was in front of me, at the end of the table, right in front of the door. The door was open, and the defendant was standing. Directly I said, 'Well, I guess I will take you up and do the best I can for you,' or, 'I guess I'll go into it,' or something of that kind. I took out my pocket-book, and counted out fifty dollars in paper money. I took this in my hand as I was sitting and reached it out toward defendant, and at the same time I reached out my right hand to him, and said, 'Here is your fifty dollars; now give me the gold.' He did not have the gold in his hand then. He had it out in his hand shortly before that, but had put it back in his pocket. I can't say just where his hands were when I said and did as I have stated above, but my impression is that it was right near the pocket where he had put the gold. I think he had put the gold in his right pocket. When I held out my left hand with the greenbacks and said, 'Now give me the gold,' and reached out my right hand, defendant took the greenbacks

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and immediately stepped out of the door. As he stepped out he said, 'I'll be back in a minute.' He nearly closed the door, but did not latch it. I think he put the money in his pocket. I have never received the gold. I have never received the clothes either. I then went down stairs. Miller went right with me. He kind of followed me. I went out in front of the hotel. When I next saw the defendant, he was just turning the corner of McWhinney's pork-house. I just got a glimpse of him, and followed right after him."

On cross-examination, Walters, amongst other things, said :

"He told me, 'In addition to the fifty dollars, I will give you a suit of clothes.' I looked over the goods. He was to give me the fifty dollars for showing his samples in Iowa. He said he would pay fifty dollars in advance. When I handed him the fifty dollars, I reached it to him. I made no objection to his taking the money."

Huber testified that he won the money from Walters on what he called a lottery, in which envelopes and cards with numbers on them were used, and was corroborated in that respect by the testimony of Miller.

There was also testimony tending to show that Huber and Miller had become acquainted about the 1st of February, 1877, at Indianapolis, and had, during that month, gone over from Indianapolis to Richmond together; that they had been known in Indianapolis by names different from those under which they were respectively indicted and known in Richmond; that the names under which they were indicted were not their true names, and that Huber was not an agent for any clothing establishment, but only claimed to be, as a blind for his so-called lottery business.

It is urged on behalf of the appellant, that the evidence, even when construed most strongly for the State, did not make out a case of larceny; that it did not sufficiently appear that the money was taken without the consent of Walters.

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In Bicknell's Criminal Practice, page 835, it is said, on what we regard as reliable authority, that, "In all cases where, although the possession was delivered with the consent of the owner, yet such consent was obtained by some fraudulent trick or contrivance with intent to steal, the transaction will be larceny—the taking in such cases being a constructive taking."

It is also said, "Where the defendant offered gold for bank-notes, and, bank-notes being delivered to him, went away with them, promising to return immediately with the gold, and never came back, it was left to the jury to say whether the defendant, at the time he took the notes, intended to steal them. 4 Taunt. 274; 9 C. & P. 784."

In the case of *Rex v. Williams*, 6 C. & P. 390, the prisoner was indicted for stealing a half-crown, two shillings and six penny pieces. "It appeared that the prisoner went to the shop of the prosecutor, and asked the prosecutor's son, who was a boy, to give him change for a half-crown. The boy gave him two shillings and six penny pieces, and the prisoner held out a half-crown, of which the boy caught hold by the edge, but never got it. The prisoner then ran away."

PARK, J., said, in summing up: "If the prisoner had only been charged with stealing the half-crown, I should have had great doubt, but he is indicted for stealing the two shillings and the copper. He pretends that he wants change for a half-crown, gets the change, and runs off; I think that is a larceny." 2 Bishop Crim. Law, secs. 815, 816 and 817, and notes to sec. 812; 2 Archb. Crim. Pr. & Pl., 8th ed., 1209; 2 Whart. Am. Crim. Law, secs. 1857 and 1858; 2 Russ. Crimes, 192.

We think there was evidence tending strongly to show that the money was obtained from Walters by Huber by a mere trick, a fraudulently prearranged scheme or contrivance, with the intention of stealing it, and that, hence, the verdict is sustained by sufficient evidence.

Although exceptions were reserved to all the instruc-

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tions given on the trial, objections are only urged here to instructions known as Nos. four and seven. No. four was as follows :

“ You should not convict the defendant, unless the State proves beyond a reasonable doubt,

“ First. That the defendant stole some portion of the property described in the indictment ;

“ Second. That the property stolen was of some value ;

“ Third. That the property, if stolen, was the property of Joseph Walters ; and,

“ Fourth. That the act of stealing was committed in this county, within two years prior to the finding of the indictment.”

The objection urged to this instruction is, that it assumes the money to have been stolen, in violation of the rules laid down in *Smathers v. The State*, 46 Ind. 447, and in *Barker v. The State*, 48 Ind. 163.

Construing all its parts together, as we are required to do, we do not think the instruction is obnoxious to that objection.

In the seventh instruction, the court put a hypothetical case to the jury, corresponding to the main features of Walters' testimony, and concluded by saying :

“ And if the evidence convinces you beyond a reasonable doubt, that said Huber, at the time he received said money, intended to permanently deprive said Walters, without his consent, of the ownership of said money so delivered to him, said Huber would be guilty of the larceny of said money, and you should convict him.”

The objections urged to the above concluding portion of this instruction are : 1st. That it assumes that certain facts were proved, which were not proved ; 2d. Granting the facts to be true, the transaction did not constitute a larceny, in the light of the authorities cited on behalf of the appellant.

We think that portion of the instruction, thus complained of, is, perhaps, more peremptory in its terms than

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it might have been; but we are of the opinion, that, taking the instruction as a whole, in connection with the other instructions given on the trial, no substantial error was committed in giving it.

The prosecuting attorney, in his closing argument to the jury, said: "The evidences of guilt are stamped upon the countenance of the defendant;" to which the appellant, by his counsel, interposed an objection. To this the court replied, in the presence and hearing of the jury, "Take your objection," and an exception was reserved by the appellant.

The appellant was examined as a witness in the cause in his own behalf, and by that means the attention of the jury was necessarily directed to his personal appearance. It does not appear, from the bill of exceptions, whether the remarks of the prosecuting attorney, complained of, were made while commenting upon the appellant's testimony, or in connection with some other branch of the case. The prosecutor had the right to refer to the countenance of the defendant while testifying as a witness, as one of the tests of his credibility. Considered as an abstract proposition, aside from the defendant's appearance as a witness, these remarks would seem to transcend the limit of legitimate argument on the trial of a criminal cause; but the objection of the appellant to their utterance, so far as we are enabled to judge of what occurred on the occasion, was sustained by the court, and their impropriety thus brought to the attention of the jury. As the proceeding comes to us from the record, we can not hold that it constituted such an error of law on the trial as amounted to a sufficient cause for a new trial.

As a question of practice, resulting from the very necessity of the case, the courts have a very considerable, if not a very large, discretion as to the limits they will place on the argument, in the trial of a cause before a jury. It must clearly appear that such discretion has been improperly exercised against the party complaining,

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before this court would be justified in revising the action of the court below in the exercise of such discretion.

We are unable to see that any substantial error was committed on the trial.

The judgment is affirmed, at the costs of the appellant.

SHROYER v. BASH ET AL.

PRACTICE.—New Trial.—Assignment of Error.—Supreme Court.—Matter which is merely cause for a new trial is not assignable as error, on appeal to the Supreme Court.

ARBITRATION.—Revocation.—After arbitrators have commenced their hearing of a cause submitted to them, under the statute of this State, (2 R. S. 1876, p. 317,) neither party can revoke his submission.

SAME.—Nature of Revocation.—Where the agreement of submission of a cause to arbitration is in writing, a revocation of such submission, to be valid, must also be in writing.

SAME.—Action upon Arbitration Bond.—Damages.—Measure.—The measure of damages recoverable in an action upon an arbitration bond is the amount of the judgment confirming the award, with interest and costs, not exceeding however the penalty of the bond.

SAME.—Award.—Validity.—Can not be Attacked.—The validity of such award can not be impeached or called in question, in such action.

SAME.—Objections to Award.—When made.—All valid objections to an award must be duly presented according to the provisions of such statute at the time when such award is presented for confirmation by the proper court.

SAME.—Action for Award.—When Maintained.—An action on an arbitration bond, to recover the amount of the award, can not be maintained, until such award has been duly confirmed by the proper court.

SAME.—Award.—Confirmation of.—A statutory award in this State against a party is not a valid claim against him, until it has been duly confirmed by the proper court.

SAME.—Pleading.—Complaint.—The complaint in an action upon an arbitration bond, to recover an award, must aver that such award has been duly confirmed.

From the Huntington Circuit Court.

B. F. Ibach and G. W. Stults, for appellant.

L. P. Milligan, J. C. Branyan, C. W. Watkins, H. B. Saylor and J. B. Kenner, for appellees.

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Howk, J.—The appellant, as plaintiff, sued the appellees, as defendants, on an arbitration bond, in the court below.

In his complaint, the appellant alleged, in substance, that on the 24th day of June, 1874, the appellees Henry and Albert W. Bash agreed with the appellant to submit to Jehu Swaidner, Calvin B. Richards and William W. Callison, as arbitrators, certain matters of difference between the appellant and said appellees, as set forth in their agreement of submission, a copy of which was filed with, and made a part of, said complaint; that, on the same day, the said appellees Bash and Bash, with their co-appellees, Martin A. Gardner and Aaron Rose, as their sureties, by their writing obligatory, a copy of which was filed with, and made a part of, said complaint, agreed, in the penal sum of one thousand dollars, to faithfully perform and abide by the decision of said arbitrators; that said arbitrators met on the 10th day of August, 1874, after being duly sworn, the appellant and the appellees Bash and Bash being then and there present, and on the 17th day of August, 1874, made their award in writing, by which they awarded that the appellees Bash and Bash should pay the appellant the sum of one thousand seven hundred and one dollars and sixty-three cents; that, within fifteen days of the signing of said award by the said arbitrators, a copy of their award as made by them was delivered to each of said parties to said submission by one of said arbitrators; that the appellees Bash and Bash did not carry out their said agreement, and did not abide by and perform the said award; and that they did not pay, though the same was demanded, the sum awarded, or any part thereof, to appellant's damage in the sum of three thousand dollars. Wherefore, etc.

It appears from the agreement of submission, which was made a part of the complaint, that "all matters of controversy" existing between the appellant and the appellees Bash and Bash, "arising out of their live-stock

Shroyer v. Bash et al.

partnership dealings, and all matters relating thereto, commencing October —, 1873, and ending April 3d, 1874, by mutual consent," were "submitted to Jehu Swaidner, Calvin B. Richards and William W. Callison as arbitrators, for final settlement, and that the same be made the rule of the Huntington Circuit Court, Huntington county, Indiana."

The appellees demurred to appellant's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled by the court below, and the appellees excepted to this decision.

The appellees answered the appellant's complaint in three paragraphs.

In the first paragraph of their answer, the appellees admitted that they executed the bond, as alleged in appellant's complaint, and that they, by agreement, submitted their case to the arbitrators named in said complaint; but that the arbitrators, and more particularly one of them, Jehu Swaidner, acted so corruptly and conducted the hearing in such a manner as to prevent any thing like a fair hearing, he having control over the umpire or third arbitrator; that said Jehu Swaidner acted as an attorney on the side of the appellant, in working up his case, and was very deeply interested, insomuch that his prejudice and interest plainly swayed his judgment; that the appellees, seeing their interest was suffering from the course of said arbitrators, and that they could not obtain justice from said court, at the time openly announced their withdrawal from said arbitrators, and then and there announced to said arbitrators that they revoked their submission, and withdrew from said arbitration; that said arbitrators, under protest of one arbitrator, proceeded to, and did, make up a pretended award, and said award was the same as the one then made a rule of the court below; and the appellees said, that, on account of the said corrupt acts of said arbitrators, they withdrew, and therefore they prayed judgment for costs and all proper relief.

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The second paragraph of appellees' answer was a general denial; and the third paragraph was a special defence, setting up affirmative matter in bar of this action.

The appellant demurred separately to the first and third paragraphs of appellees' answer, for the alleged insufficiency of the facts in each of said paragraphs to constitute a defence to this action. The court below overruled the demurrer to the first paragraph, and to this decision the appellant excepted; and the court sustained the demurrer to the third paragraph of said answer, and to this latter decision the appellees excepted.

The appellant replied, by a general denial, to the first paragraph of the appellees' answer. And the issues joined were tried by a jury in the court below, and a verdict was returned for the appellees. For written causes, the appellant moved the court below for a new trial, which motion was overruled, and the appellant excepted to this decision. And judgment was rendered on the verdict by the court below.

The only alleged errors of the court below, properly assigned by the appellant in this court, are these:

1st. In overruling the appellant's demurrer to the first paragraph of appellees' answer; and,

8th. In overruling appellant's motion for a new trial.

The alleged errors numbered from two to seven, both inclusive, are merely causes for a new trial, being errors of law occurring at the trial.

Causes for a new trial are not assignable, as such, as errors, in this court; and if they are assigned here as errors, they present no questions for our consideration, and will not be considered. This has long been the practice of this court, and is now so well established that it needs no citation of authorities in its support.

The first alleged error, assigned by the appellant, is the decision of the court below in overruling the appellant's demurrer to the first paragraph of the appellees' answer. It would seem, from the averments of this first paragraph

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of answer, that the appellees intended therein and thereby to set up at least two supposed defences to the appellant's action, to wit: 1st. A revocation by the appellees, before the award, of the submission to arbitration; and, 2d. Such evident partiality or corruption in one of the arbitrators as would prevent the rendition of any judgment on the award.

We will consider separately these two intended defences, and determine whether either or both of them have been stated by appellees, in this paragraph of answer, in such manner as to constitute a good defence to appellant's cause of action.

1. The arbitration proceedings, which underlie the appellant's cause of action, as stated in his complaint, were begun and had under, and in an intended conformity with, the provisions of "An act relative to arbitrations and umpirages," approved February 3d, 1852. 2 R. S. 1876, p. 317. The first question presented for our consideration by the first paragraph of appellees' answer is this: Can either of the parties to a statutory arbitration, at any time before or during the hearing of the cause, revoke his submission to arbitration?

This is a new and important question, and, so far as we are aware, one that has never been presented to nor considered by this court. At common law, an agreement to submit a pending controversy to an arbitration was an executory contract, and was revocable until executed by an award. *Vynior's Case*, 8 Coke, 162; S. C., 1 Brownl. 62; *Milne v. Gratrix*, 7 East, 608.

The common law, and the acts of Parliament in aid thereof, prior to the fourth year of James I., with certain specified exceptions, which are of a general nature and not local, and not inconsistent with the constitution of the United States or of this State, or the acts of Congress or statutes of this State, have always been, and still are,

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the recognized law of this State. 1 R. S. 1875, p. 605, Chapter 161.

Our statute, before cited, relative to arbitrations and umpirages, makes no provision whatever for, and does not seem to contemplate, as we construe it, any revocation of any agreement of submission to arbitration, at any time. The statute makes ample provision however, as it seems to us, for a full and fair trial by the arbitrators of the matters submitted to them. It requires the arbitrators to be first sworn for the faithful, fair and just performance of their duties; it directs that the opposite party and the arbitrators shall have at least ten days' written notice of the time and place appointed for the meeting of the arbitrators; it provides for the compulsory attendance of witnesses; and it declares the imperative duty of all the arbitrators to meet together and hear the proofs exhibited and the allegations of the parties. It also provides for the ascertainment of the fees and costs incident to the arbitration, and for the service of a copy of the award and costs on each of the parties, within fifteen days after the award has been signed.

The 16th section of said statute provides as follows:

"Sec. 16. In all cases where an award or umpirage shall be presented to any court of record for a judgment to be entered thereon, whether the reference shall have been made by submission of parties as aforesaid, or by rule of court, the adverse party may show for cause against the rendition of said judgment any of the following grounds:

"*First*. That such award or umpirage was obtained by fraud, corruption, partiality, or other undue means; or that there was evident partiality or corruption in the arbitrators or any of them.

"*Second*. That the arbitrator or arbitrators [was or] were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence material and pertinent to the controversy,

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or any other misbehavior by which the rights of any party shall have been prejudiced.

"*Third.* That the arbitrator or arbitrators exceed his or their powers, or that he or they so imperfectly executed them that a mutual, final, and definite award on the subject-matter submitted was not made." 2 R. S. 1876, p. 321.

It seems very clear to us, from these provisions of our statute relative to arbitrations and umpirages, that they are utterly inconsistent with the assumed right or power of any of the parties to a statutory arbitration to revoke the agreement of submission, at any time after the arbitrators have been sworn and entered upon the hearing of the subject-matter submitted to them. For every reasonable and sufficient ground for any such revocation, the 16th section, before cited, of our statute affords a full, complete and ample remedy; and it can not be supposed, that the law would tolerate such a revocation without cause, upon the mere whim or caprice of any of the parties to the agreement of submission.

The conclusion we have reached on this point, in the case now before us, is in strict harmony with the doctrine laid down by the Supreme Court of Ohio, in the case of *Carey v. The Commissioners of Montgomery County*, 19 Ohio, 245. In the State of Ohio, as in this State, the common law of England, except as the same may be contravened by constitutions, statutes, etc., is the law of the land. In that State, also, there was a statute providing for and regulating arbitrations, the provisions of which, though very similar to, were not so full and explicit as, those of our statute. Under these circumstances, it was held by the Supreme Court of Ohio, in the case cited, that none of the parties to a statutory arbitration had any right to revoke the agreement of submission, after the arbitrators had been sworn.

In the case at bar, it appears, from the averments of the first paragraph of the answer, that the ap-

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pellees attempted to revoke their submission, during the hearing of the cause by the arbitrators. We are satisfied that such a revocation, in a statutory arbitration such as the parties had agreed to, was not authorized by the law of this State; and, therefore, we hold that such a revocation did not constitute a valid defence to the appellant's cause of action, as stated in his complaint.

One other objection is suggested to the alleged revocation, as stated in the first paragraph of the appellees' answer, which we will briefly notice. It appears, from appellant's complaint, that the agreement of submission was a written instrument, executed by the parties under their hands and seals; and this was not controverted in or by the first paragraph of appellees' answer. As we have seen, either party might, at common law, revoke the submission at any time before the award. But, while this was so, it was also the law, that the revocation must be by authority equal to that which made the submission, and that a submission by deed must be revoked by deed. In accordance with this doctrine, it was held by this court, in the case of *The Madison Insurance Co. v. Griffin*, 8 Ind. 277, that the board of directors of the appellant having made the submission to arbitration, its president and secretary, although authorized by law to carry on its business without the presence of the directors, could not, under that authority, revoke the submission. It seem to us a fair corollary of this doctrine, that where, as in this case, the agreement of submission is shown to have been a written instrument, any revocation thereof, to be valid, must be also a written instrument. Yet it does not appear, from the averments of the first paragraph of appellees' answer, that the alleged revocation of the submission was in writing, in the case now before us.

2. We come now to the consideration of the second defence, which the appellees apparently intended to set up in the first paragraph of their answer, as a bar to the appellant's action, and that was, such evident partiality

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or corruption, in one of the arbitrators, as would prevent the rendition of any judgment on the award. In this case, the appellant did not seek to obtain the rendition of any judgment on the award of the arbitrators; but, in lieu thereof, he commenced this action against the appellees, the parties to the award and their sureties, on their arbitration bond. The bond sued upon was a penal bond, conditioned, as required by the statute, that the appellees Henry and Albert W. Bash should abide by and faithfully perform the award of the arbitrators named in said bond. In such a suit, the measure of the liability of the obligor in such a bond, to the obligee, would be the judgment of the proper court on the award of the arbitrators, with interest on such judgment and costs, not exceeding, however, the penalty of the bond. In an action on an arbitration bond, executed in an arbitration under and in conformity with the provisions of our statute in relation to arbitrations and umpirages, the validity of the award can not be impeached or called in question; and, therefore, it seems to us, that the alleged partiality or corruption of one or more of the arbitrators, in a statutory arbitration, would not constitute a valid defence to an action properly brought on the arbitration bond. Whether or not this action was properly brought, is a question we will determine when we come to the consideration of the appellees' cross-errors.

Upon the first error assigned by the appellant, our conclusion is, that the facts stated in the first paragraph of the appellees' answer, for the reasons we have given, were not sufficient to constitute any defence to the appellant's action, if such action had been properly brought.

We pass over the questions presented by the second alleged error, assigned by the appellant, as of but little importance, and having no bearing whatever upon the proper decision of this cause.

The appellees have assigned, in this court, as a cross-error, the decision of the court below in overruling their

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demurrer to the appellant's complaint. This cross-error presents for our consideration this important question:

In a statutory arbitration, where an award has been made, "if either of the parties shall fail or refuse to comply with such award," can "the other party," in the first instance, and without having filed the award in the proper court and obtained a rule and judgment thereon, as provided by the statute, bring an action on the arbitration bond to force a compliance with the award?

At common law, in such a case, a party had his choice of remedies, and as to the order in which he would pursue them; that is, he might sue, in the first instance, either upon the award or upon the arbitration bond.

It seems to us, however, that, under a fair and reasonable construction of our statute relative to arbitrations and umpirages, the first remedy of a party, who seeks the enforcement of a statutory award, is the proceeding authorized and provided for by the terms of the statute, to wit, by a rule against the adverse party and a judgment on the award.

It is manifest, we think, that such was the legislative intent in the enactment of said statute, from the fact that the adverse party, in such a proceeding, is fully authorized and permitted, in and by the 16th section, before cited, of said statute, to show every just and reasonable cause against the rendition of any judgment on the award; while, in and by the 17th section of said statute, ample provision is made for modifying or correcting the award, in the same proceeding. 2 R. S. 1876, p. 322. In the 18th section of the statute, it is provided, that, in this same proceeding, "The court shall hear the proofs and allegations of the parties, to invalidate and sustain such award;" and that, upon such hearing, the court may vacate, modify and correct, or confirm the award. 2 R. S. 1876, p. 323.

Under these provisions, it is clear to our minds, that a statutory award must be regarded as merely *in fieri*, un-

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til it has the sanction of, and is confirmed by, the proper court on the hearing, in the proceeding provided by the statute for that purpose. Until such confirmation of the award, it is imperfect and incomplete, and may or may not be a valid award. The award, called for by the provisions of our statute, is an award confirmed by the proper court, in a proper proceeding for that purpose; and this is the award, which the parties execute bonds with condition to abide by and faithfully perform. In our opinion, under a fair construction of the entire statute, an action can not, and ought not to, be maintained on a statutory arbitration bond, for the enforcement of the award, until such award, in a proper proceeding for that purpose, has been confirmed by the judgment of the proper court. From this decision, of course, it follows logically and legally, that, in a complaint on such an arbitration bond, it must be averred, *inter alia*, that the award of the arbitrators, in a proper proceeding for the purpose, had been confirmed by the judgment of the proper court.

In the case at bar, the appellant's complaint did not contain any such averment; and, therefore, we hold that the court below erred in overruling the appellees' demurrer to said complaint.

The judgment of the court below is reversed, the appellant to pay one-half and the appellees to pay the residue of the costs, and the cause is remanded, with instructions to sustain the appellees' demurrer to the appellant's complaint, and for further proceedings in accordance with this opinion.

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57	360
138	157
57	360
152	634

MALICIOUS PROSECUTION.—*Inquisition of Lunacy.*—*Damages.*—One who maliciously, and without probable cause, institutes or procures to be instituted against another an inquisition of lunacy, is liable to the latter on his discharge, in an action for malicious prosecution, for all damages suffered by him in excess of the taxable costs of such proceeding.

SUPREME COURT.—*Death of Party after Submission.*—*Judgment.*—*Practice.*—Where, after the submission of a cause to the Supreme Court on appeal, a party thereto dies, judgment in the cause may be afterwards rendered as of the term at which the cause was submitted.

From the Washington Circuit Court.

H. Heffren and S. B. Voyles, for appellant.

T. L. Collins and A. B. Collins, for appellees.

WORDEN, J.—This was an action by the appellant against the appellees, to recover damages for an alleged malicious prosecution.

The complaint consisted of two paragraphs.

Demurrer, for want of sufficient facts (to each paragraph) sustained, and exception. Final judgment for defendants.

Errors assigned upon the rulings in sustaining the demurrers.

The first paragraph of the complaint alleged, in substance, that the defendants, conspiring and confederating together, maliciously and without probable cause, instituted and carried on proceedings against the plaintiff, in that court, at the March term thereof, 1874, to procure him to be adjudged insane, and to thereby deprive him of the right and liberty to manage and control his property, and to place him under guardianship; that the defendant Shoemaker filed the complaint or statement in writing, alleging the plaintiff's unsoundness of mind, and that a summons issued thereupon and was served upon the plaintiff herein, requiring him to appear in that behalf; that he did appear, and was put to great trouble

and expense in employing counsel and attorneys in that behalf, to wit, an expense of three hundred dollars; that by reason of the false charges thus made by the conspirators, the plaintiff was compelled to exert himself beyond his physical powers, he being an old man and in feeble health, to meet and resist the false charges thus made, whereby he became prostrated and broken down in health, to such an extent that he was compelled to employ physicians to attend upon, prescribe for and nurse him for the period of four months, at an expense of two hundred dollars; during all which time his business suffered great loss and waste.

The prosecution resulted in the discharge of the plaintiff herein from the proceeding.

The second paragraph was much the same as the first in its general features, but it alleged the same kind of a proceeding at a subsequent term of the court, in which the cause was tried by a jury, resulting in a verdict that the plaintiff herein was not a person of unsound mind, and in his discharge. In the latter case, the defendants did not, nor did either of them, file the statement of the plaintiff's unsoundness of mind; but it is alleged, that the defendants herein, "in pursuance of their malicious conspiracy, confederated with and hired one James Mayhan, for the sum of thirty dollars, to file the said false, wicked and malicious complaint aforesaid, in the office of the clerk aforesaid."

Both paragraphs set out the matter complained of very fully and in detail, but we have thought it unnecessary to transcribe them here in full. We have only stated enough to show the general nature of the action. The averments are full in each paragraph, and each states facts sufficient, in our opinion, to constitute a cause of action, if an action will lie for prosecuting such a proceeding maliciously and without probable cause.

The statute provides for the trial of the question of unsoundness of mind, "Whenever any person shall by

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statement in writing, represent to the court having probate jurisdiction, in any county, that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate." If found to be of unsound mind, a guardian is to be appointed for him, who is to have custody of his person and the management of his estate. If the person is found not to be of unsound mind, the court shall give judgment for costs against the person making the complaint. See 2 R. S. 1876, p. 598.

The appellees claim, as we understand their brief, that the plaintiff can not recover, inasmuch as the proceedings to test his sanity were not criminal proceedings, and he was not arrested or in any manner deprived of his personal liberty, nor was his property interfered with; and as to the expense to which he was put, he was fully indemnified by his judgment for costs against the parties filing the complaints.

We are aware, that it has been sometimes thought that an action will not lie for maliciously, and without probable cause, prosecuting a mere civil action. Thus it is said in 2 Addison Torts, p. 752, "If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action." The more modern doctrine, however, and especially the American doctrine, seems to be otherwise. In 1 Hilliard Torts, 4th ed., p. 443, sec. 11, it is said, that "It has been sometimes held, that an action for a malicious prosecution will not lie for bringing a civil suit, although it were groundless. Thus for holding a defendant to bail, upon an unfounded claim, a civil action being a claim of right, to be pursued only at the peril of costs, if not sustained. And although an action is held to lie for suing in the name of a third person; yet a distinction is made between suing in the name of a solvent and an insolvent person. The explanation of this difference between criminal prosecutions and civil actions is found in part in the fact,

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that the common law, in order to hinder malicious, frivolous, and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. And after this practice ceased, statutes provided costs for a prevailing defendant. But the qualified doctrine is now well settled, in relation to civil actions (corresponding with the rule as to criminal prosecutions), that no action lies to recover damages sustained by being sued in a civil action, unless it was malicious and without probable cause."

In England, it is held, that an action will lie for falsely and maliciously suing out a commission of bankruptcy. *Chapman v. Pickersgill*, 2 Wils. 145. The Lord Chief Justice said, in that case:

"The general grounds of this action are, that the commission was falsely and maliciously sued out, that the plaintiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a *supersedeas* to the commission; here is falsehood and malice in the defendant, and great wrong and damage done to the plaintiff thereby. Now wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself." See, also, *Farlie v. Danks*, 30 Eng. Law & Eq. 115.

In turning to the American cases, we find that in *Whipple v. Fuller*, 11 Conn. 581, it was held, that "An action on the case at common law, is sustainable for a vexatious civil suit, in which there was no arrest, or holding to bail."

CHURCH, J., said, in delivering the opinion of the court:

"But we wish to place our decision of this question upon broader principles; principles which we believe have received the sanction of the common law in its earliest ages. Before the statute of MARLBURGH, which was passed in the 52d year of Hen. III., no costs were recoverable in civil actions. This statute, and others

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subsequently enacted, gave costs to successful defendants, as it is said, by way of damages against the plaintiff, *pro falso clamore*. Whatever might have been true when the several statutes giving costs, were enacted, we can not, at this day, shut our eyes to the truth known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares, that for every injury there is a remedy. Before the statutes entitling defendants to costs, existed, they had a remedy at common law, for injuries sustained by reason of suits which were malicious and without probable cause. * * * And this principle is, and ought to be, operative still, in all cases where the taxation of costs is not an ample remedy. *Saville v. Roberts*, 12 Mod. 208. S. C., 1 Salk. 14.

"It is upon this principle, in part at least, that actions have ever been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. 1 Salk. 14. 10 Mod. 148. *Smith v. Hixon*, 2 Stra. 977.

"So also, if two or more persons conspire to vex and harass any person with groundless and malicious civil suits, they were not only punishable *criminaliter*, but liable to a civil action. *Staundford P. C.* 172. 1 Inst. 562. Co. Litt. 161 *a.*"

In the more recent case of *Closson v. Staples*, 42 Vt. 209, the same doctrine was held, after full consideration of the question. The court said, in conclusion, upon that branch of the case:

"We are of opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defence of that original suit, in excess of the taxable costs obtained by him; and to maintain an action

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to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only."

To the same effect are the cases of *Pangburn v. Bull*, 1 Wend. 345; *Cox v. Taylor's Adm'r*, 10 B. Monroe, 17. See, also, *Vanduzor v. Linderman*, 10 Johns. 106; *White v. Dingley*, 4 Mass. 433.

The proceedings to procure the plaintiff to be found insane, and to place him under guardianship, are not entirely like a civil action, in which the plaintiff therein claims some right in his own behalf. If the proceedings were instituted and carried on by the defendants maliciously and without probable cause, as alleged, the defendants were officious intermeddlers, without any claim of right or interest in the matter; and they are, in our opinion, liable to the plaintiff for the damages, in excess of the taxable costs, sustained by him by means of the proceedings.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

NOTE.—It appearing that one of the appellees, George Shoemaker, has departed this life since the submission of the cause, judgment is rendered as of the term when the submission was made.

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REVIEW OF JUDGMENT.—*Pleading*.—*Complete Record*.—A complaint to review a judgment for alleged error of law, apparent on the face of the record, must contain a complete record of all the pleadings and proceedings of the cause wherein such judgment was rendered.

SAME.—*Errors must have been Excepted to*.—Where such complaint to review does not show that exceptions were duly taken to the errors alleged, it is insufficient on demurrer.

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From the Tipton Circuit Court.

J. W. Robinson, N. R. Overman, R. B. Beauchamp and G. Gifford, for appellants.

J. Green, D. Waugh, J. Waugh and N. R. Linsday, for appellees.

Howk, J.—The appellants, as plaintiffs, commenced this action against the appellees, as defendants, in the court below, to obtain the review of a certain judgment before that time rendered by said court, in favor of the appellee Cravens, and against the appellants and the appellee John M. Harmon, who refused to join with the appellants in this appeal.

Appellants' complaint in this case was in four paragraphs, but the grounds of complaint in each paragraph were alleged errors of law appearing in the proceedings and judgment sought to be reviewed.

The appellee Cravens demurred to each paragraph of the complaint, for the want of sufficient facts therein to constitute a cause of action, which demurrers were each sustained by the court below, and to these decisions the appellants excepted. And the appellants failing to amend or plead further, judgment was rendered on the demurrers in favor of the appellee Cravens, and against the appellants and the appellee Harmon.

The appellants have assigned as errors, in this court, the decisions of the court below in sustaining the demurrers of the appellee Cravens to the several paragraphs of this complaint.

It seems to us, that it would be a waste of time and labor to set out in this opinion even the substance of the several paragraphs of the appellants' complaint.

In the proceedings and judgment sought to be reviewed, in so far as the same were made parts of appellants' complaint, not a single exception had been saved by the appellants, or by any one in their behalf, to any

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of the alleged errors of law, which, it was claimed, were apparent in said proceedings and judgment.

But the most serious objection to the appellants' complaint in this cause, and the one which rendered every paragraph thereof alike fatally defective on appellee's demurrer, was its failure to "bring before the court a full record of the proceedings and judgment in the case sought to be reviewed, including the original complaint, answer, and other pleadings and proceedings in the cause." *McDade v. McDade*, 29 Ind. 340. *Davis v. Perry*, 41 Ind. 305; *Owen v. Cooper*, 46 Ind. 524; *Kitch v. The State, ex rel., etc.*, 53 Ind. 59; *Weathers v. Doerr*, 53 Ind. 104; *Hardy v. Chipman*, 54 Ind. 591.

We hold, therefore, that no error was committed by the court below, in sustaining the appellee's demurrers to the appellants' complaint, and to each paragraph thereof.

The judgment of the court below is affirmed, at the appellants' costs.

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125 82

EVANS ET AL. V. GALLANTINE.

BANKRUPTCY.—*Composition with Debtor.*—*Contract.*—*Pleading.*—Pending a proceeding in bankruptcy, the creditors executed a composition agreement in writing, that "We, the undersigned, creditors of" the defendant, "hereby agree to accept" a certain percentage "on the dollar for our respective claims against him, in full settlement," to be paid in specified instalments, "to be secured by notes, with good approved security; this is to be consummated within thirty days,—otherwise void."

Held, on demurrer, in an action against the debtor by one of such creditors, to recover for his claim, wherein the former had answered such composition agreement and alleged that he had fulfilled the same by executing his notes to the plaintiff, as provided therein, that the answer is insufficient for want of an averment that such agreement had been duly executed as to all such creditors.

Held, also, that such agreement was one between the creditors themselves,

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as well as between them and the debtor, and if not executed as to all within the time specified, it became null and void.

SAME.—*Instruction to Jury Outside of the Issues.*—In such action, under the issues formed by such answer, it is error for the court to instruct the jury that the terms of such agreement might be waived by the plaintiff by a subsequent verbal agreement.

From the Marshall Circuit Court.

C. H. Reeve, B. Harrison, C. C. Hines and W. H. H. Miller, for appellants.

A. C. Capron and A. B. Capron, for appellee.

Howk, J.—The appellants, as plaintiffs, sued the appellee, as defendant, in the court below, to recover a balance alleged to be due on an open account, for goods sold and delivered by the appellants to the appellee, and interest thereon.

The complaint was in two paragraphs, but the cause of action stated was substantially the same in both paragraphs.

For answer to appellants' complaint, the appellee said, in substance, that he admitted, that he was, on the 8th day of February, 1871, indebted to the appellants on account, as set forth in their bill of items in this action, in the sum of eight hundred and seventy dollars and thirty-two cents; but he averred, that prior to said time, and after he had become so indebted to the appellants, the appellee's financial affairs had become somewhat involved, and he was in embarrassed circumstances; that proceedings in bankruptcy had been instituted against him in the District Court of the United States for the district of Indiana, in which district he resided, by John V. Farwell & Co., who were his creditors; that in order to avoid litigation, and in order to prevent his estate from passing into the hands of an assignee in bankruptcy, the appellee offered a large number of his creditors, including the appellants and the petitioning creditors in the bankruptcy case, to pay or secure to his said creditors fifty cents on the dollar, on their respective claims, in consideration

of which, said creditors should accept said one-half of their claims as a full and complete adjustment and satisfaction of their several claims; that said offer led to negotiations, which finally terminated in a written agreement on the part of the appellants and certain other creditors of the appellee, a copy of which agreement was filed with and made part of said answer, by which the appellants agreed to accept fifty cents on the dollar, of said appellee, in full settlement and satisfaction of their said claim, the same to be paid by the appellee in certain instalments secured by note, as set forth in said agreement; and the appellee averred, that he did, within the thirty days specified in said agreement, execute and deliver to the appellants his promissory notes with security to their approval, due at nine months, drawing ten per cent. interest, to the amount of two hundred and twenty-one dollars and eleven cents, and also paid the appellants the sum of two hundred and fourteen dollars and five cents in cash; which said notes and cash were taken and received in full satisfaction of the account sued on in this action. Wherefore the appellee said, that the appellants ought to take nothing by their said action, and he prayed judgment for costs.

The agreement, which was filed with and made part of appellee's answer in this action, appears to have been executed by the appellants and thirteen other individual, partnership or corporate creditors of the appellee. Omitting the signatures thereto, we set out this agreement, as necessary to a proper understanding of some of the questions which arise in this action. This agreement was as follows:

"We, the undersigned, creditors of N. W. Galentine, of Bourbon, Indiana, hereby agree to accept fifty cents on the dollar for our respective claims against him, in full settlement; the same to be paid in three, six and nine months from the date hereof, with ten per cent. interest,

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to be secured by notes, with good approved security; this is to be consummated within 30 days,—otherwise void.

“Chicago, February 8th, 1871.”

The appellants demurred to appellee's said answer, for the alleged insufficiency of the facts therein to constitute a defence to this action, which demurrer was overruled by the court below, and the appellants excepted to this decision. And the appellants replied in three paragraphs to appellee's answer,—the first paragraph being a general denial, and each of the other two containing affirmative averments, which require no special notice.

The issues joined were tried by a jury in the court below, and a verdict was returned for the defendant, the appellee. Appellants' motion for a new trial was overruled, and their exception saved to this decision, and judgment was rendered on the verdict.

The appellants have assigned in this court the following alleged errors of the court below:

1st. In overruling their demurrer to appellee's answer; and,

2d. In overruling their motion for a new trial.

It seems very clear to us, that the facts stated in appellee's answer were not sufficient to constitute a defence to appellants' action. Appellee's learned attorneys, in our opinion, have misapprehended the force, effect and meaning of the agreement for composition, which agreement constitutes the basis of appellee's answer. It is manifest, from the averments of the answer, that the agreement in question was regarded by appellee's counsel as simply an agreement between the appellee and the appellants only, and the answer was framed accordingly. Such was not the agreement, which the appellee made a part of his answer. As we have already seen, this agreement was executed, not only by the appellants, but by thirteen others of the appellee's creditors. And, of these other creditors, it would seem from the record, that all save

one had signed the agreement before it was executed by the appellants.

In the case of *Breck v. Cole*, 4 Sandf. 79, it was well said by DUEK, J.: "Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves as well as between them and the debtor. It is an agreement that each shall receive the sum, or the security which the deed stipulates to be paid or given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts then owing to the creditors who signed the deed." *Britten v. Hughes*, 5 Bing. 460, and *Huntington v. Clark*, 89 Conn. 540. And the same doctrine is recognized and fully approved in *Perkins v. Lockwood*, 100 Mass. 249, in *Bean v. Amsinck*, 10 Blatchf. 361, in *Pinneo v. Higgins*, 12 Abbott Pr. 334, and in *Kahn v. Gumberts*, 9 Ind. 430.

In the case now before us, the agreement, counted upon by the appellee in his answer as a bar to the appellants' action, was an agreement between the appellee on one side, and not only the appellants, but also all the creditors of the appellee who have signed said agreement, on the other side. It was expressly stipulated in said agreement, not only as applicable to the appellants, but also to all of the appellee's creditors who were parties to said agreement, that it should "be consummated within 30 days," and if it should not be so consummated within the time aforesaid, then it should be "void." This, in our opinion, is the plain legal meaning of the said agreement. The agreement was not absolute on its face. To make the agreement valid and binding on all or any of the appellee's creditors who had signed the same, it was indispensable, as we construe the instrument, that it should be fully consummated by the appellee as to each and all of the subscribing creditors, within the time limited. If not thus consummated by the appellee as to each and all of his creditors, the agreement, by its express terms, was to be void. If the agreement was not con-

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summed as to any one of the subscribing creditors, within the time limited, it is perfectly clear, we think, that, as to such creditor, it would be void and of no binding force. And if the agreement was void as to any one of the subscribing creditors, it necessarily follows, in our opinion, from the peculiar character of the instrument, that it would be void as to all the creditors.

When, therefore, the appellee set up his composition agreement with his creditors as a complete defence to the appellants' cause of action, it was indispensably necessary to the sufficiency and validity of his answer, that he should aver therein the full consummation of said agreement within the time limited therein. No such averment as this is to be found in appellee's answer in this action. Evidently, the theory of the appellee's answer is, that the agreement set out therein was an agreement between the appellee and the appellants only, with which the other subscribing creditors of the appellee had nothing whatever to do. But, even upon this theory, the averments of appellee's answer were clearly insufficient; for it was not averred, that, even as between the appellee and the appellants only, the composition agreement was consummated within the time limited therein.

But we need not pursue this question. We are very clearly of the opinion, that the averments of the appellee's answer were insufficient; and for this reason we hold, that the court below erred in overruling the appellants' demurrer to said answer.

The conclusion we have reached in regard to the insufficiency of the appellee's answer renders it unnecessary for us to go into a lengthy or detailed examination of the questions presented by the alleged error of the court below, in overruling the appellants' motion for a new trial. Many causes for such new trial were assigned by the appellants, consisting chiefly of alleged errors of law occurring at the trial, and excepted to by the appellants. Sev-

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eral of these alleged errors of law, in our opinion, were well assigned.

It is manifest, we think, from the instructions of the court below, of its own motion, to the jury trying the cause, that the court, in instructing the jury, had the same erroneous views of the force and effect of the composition agreement set up in the answer, which the court must have entertained when the appellants' demurrer to the answer was overruled.

In our opinion, the court below erred in instructing the jury, in effect, that the terms of the composition agreement might be waived or controlled by a subsequent verbal agreement between the appellants and the appellee, when no such verbal agreement had been set up, or was relied upon, in appellee's answer. The instructions of the court below on this point, it seems to us, were foreign to, and outside of, the case made by the pleadings.

It is unnecessary for us, however, to examine and consider the alleged errors of law occurring at the trial. Our decision in relation to the sufficiency of appellee's answer will lead to the formation of other and different issues and a new trial of this cause. And it may well be, that on such new trial none of the alleged errors of law now complained of by the appellants will again occur.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain appellants' demurrer to appellee's answer, and for further proceedings in accordance with this opinion.

 Bentley et ux. v. Dunkle.

BENTLEY ET UX. v. DUNKLE.

FRAUD.—Fraudulent Conveyance.—Action to Set Aside.—Pleading.—Husband and Wife.—In an action against a judgment debtor and his wife by the judgment creditor, to subject to execution certain real estate conveyed to her, the complaint alleged that such judgment had been rendered for the value of certain personal property furnished to the defendants for their use in a certain business carried on by them jointly, that such realty had been paid for chiefly out of the means of the husband and the joint earnings of himself and wife, that they had conspired together to cheat, hinder and delay the plaintiff in the collection of his judgment, and that the husband had no property subject to execution.

Held, that the complaint is insufficient for want of an allegation that such indebtedness existed at the time such payment on the realty was made by the husband.

Held, also, that it is insufficient for the want of the further allegation that such payment had been made by the husband with intent to defraud.

Held, also, that it is insufficient for want of the further allegation that, at the time such payment was made, the husband had not sufficient property remaining to pay all his debts.

From the Cass Circuit Court.

F. S. Crockett and M. Winfield, for appellants.

McConnell & Nelson, for appellee.

NIBLACK, J.—This case comes to us on certain questions of law, which arose during its progress in the court below, and which were reserved for the decision of this court under sections 847 and 848, 2 R. S. 1876, p. 177.

The first question, considered in its natural order, arises on the sufficiency of the complaint, which is, in substance, as follows:

Peter Dunkle, plaintiff in this suit, complains of David E. Bentley and Rosa C. Bentley, his wife, defendants, and shows to the court that the defendants are husband and wife, married prior to the year A. D. 1867, but where the plaintiff can not say; that, on the 15th day of May, 1867, the defendant Rosa C. Bentley purchased of one Edward N. Talbott the following described real estate in Cass county, Indiana, to wit: The east half of the west half

37 374
123 222
57 374
128 231

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of lot number eight (8), of the addition to the town of Logansport laid out by the administrators of the estate of John Tipton, deceased, for the consideration of one thousand eight hundred dollars, of which amount the defendant Rosa C. Bentley paid four hundred and twenty-six dollars in cash, and gave, with her husband, the codefendant, two notes of seven hundred dollars and six hundred and twenty-six dollars respectively for the balance, payable on August 11th, 1867, and June 11th, 1868; that, since said purchase, the defendants have resided together on said property as husband and wife, carrying on and operating a large boarding-house, the said David E. Bentley being employed ever since that time as an engine-driver on a railroad, receiving therefor at least the sum of one hundred dollars per month; that the said defendants have since paid for said property in full, and that the last payment was made in the sum of three hundred dollars on the 20th day of June, 1870; that, with the exception of said four hundred and twenty-six dollars, the entire payment of said realty has been made from the earnings of said boarding-house and defendant David E. Bentley's wages as such engine-driver; that, since said purchase, the defendants have made improvements on said property to the value of at least five hundred dollars, and paid for the same out of the earnings of said boarding-house and of the wages so received as an engine-driver; that during the years 1869 and 1870 the plaintiff, being a grocer, furnished said defendants with large amounts of groceries and provisions, on credit, to carry on said boarding-house; that afterward, to wit, on the 10th day of December, 1870, the plaintiff recovered a judgment against the defendant David E. Bentley for the sum of one hundred and forty-three dollars and forty-two cents and costs, for balance due plaintiff from said defendants for such groceries and provisions; that afterward the plaintiff caused an execution to issue against the defendant, which was returned "no property found whereon to levy" by

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the constable in whose hands said execution was placed; that afterward the plaintiff caused a transcript of said judgment to be made out by John C. McGregor, the justice of the peace before whom said judgment was rendered, duly certified according to law, and filed the same in the office of the clerk of the common pleas court of said Cass county; and the plaintiff avers, that said defendant David E. Bentley is the equitable owner of the undivided one-half of said real estate, and that the defendants have conspired together to cheat, hinder and delay this plaintiff; and that the defendant David E. Bentley has no real or personal property subject to execution. Wherefore the plaintiff prays the court, that the defendants be compelled to state their respective payments on and for said property, and if it shall be found, on a hearing of said cause, that said real estate has in part been paid for by the joint earnings of said defendants, that the amount so paid for be declared to be the property of said David E. Bentley, and subject to the payment of the plaintiff's judgment, and that a decree ordering the sale of his said interest may be rendered against the defendants, and that the same be sold to pay the plaintiff's judgment, with costs, and for other proper relief.

To this complaint the defendants demurred, but the court overruled their demurrer, to which they excepted.

It is objected, that the complaint is defective in not averring that David E. Bentley was indebted to the plaintiff at the time he made the alleged payments on the real estate purchased by his wife.

We think that objection is well taken. Unless the plaintiff was, at the time of these payments, a creditor of David E. Bentley, he was not in a condition to be injured by such payments, according to the facts as otherwise alleged in the complaint. It was competent for said Bentley to make such provision for his wife as he chose, unless existing creditors were thereby injured or defrauded.

It is true, that certain transactions are held to be fraudulent as to subsequent creditors, but it is not claimed that this case involves a transaction of that class.

It is also true, that the complaint alleges facts from which we might reasonably infer that David E. Bentley was indebted to the plaintiff from time to time, during the years 1869 and 1870, but there is no averment of indebtedness at any particular time, or in any specific amount, until the time of the rendition of the judgment in December, 1870, which was nearly six months after the last payment complained of was made. It does not follow, that because there was an indebtedness when the judgment was rendered, there was an indebtedness at any particular previous time.

The complaint does not, therefore, show with sufficient certainty, that the plaintiff was a creditor when any of the payments were made by David E. Bentley on his wife's property, and is hence open to objection for that reason.

The complaint does not aver that David E. Bentley made the alleged payments on his wife's real estate, with the fraudulent intent of cheating, hindering or delaying the plaintiff. We think it is also defective for the want of this or some equivalent averment.

We are also of the opinion, that the complaint is insufficient in not showing that, at the time he made the payments complained of, the said David E. Bentley did not have sufficient property remaining, subject to execution, to pay all his debts. If he had sufficient property so remaining, then the plaintiff, in legal contemplation, was not injured and had no cause to complain. The allegation that the said David E. Bentley, more than six months after the last payment, did not have any property subject to execution, does not supply the omission. He may have had sufficient property when the payments were made, but lost it in the meantime. *Sherman v. Hogland*, 54 Ind. 578; *Evans v. Hamilton*, 56 Ind. 84.

We are therefore led to the conclusion, that the court below erred in overruling the demurrer to the complaint.

The other questions reserved arose on the trial of the cause, and, as they may not again arise on a subsequent trial, we will not consider them now.

The judgment is reversed, at the costs of the appellee, and the cause remanded for further proceedings, in accordance with this opinion.

GEBHART v. BURKETT.

EVIDENCE.—Character of Defendant.—Action for Trespass.—In an action to recover damages resulting from the commission of an unlawful act, evidence of the general good character of the defendant is not admissible, whether such act is or is not indictable, except where his character is directly in issue, and, from the nature of the act charged, is of special importance.

SAME.—Arson.—Such evidence is not admissible under the general denial, in an action to recover damages for the alleged unlawful and malicious burning of a building.

SAME.—Damages.—The damages recoverable in such action are compensatory merely, and not punitive.

SAME.—Exclusion of Evidence.—New Trial.—Harmless Error.—Error in the exclusion of evidence offered on the trial of a cause is not available, where, during such trial and before the close of the evidence, the court reverses its former ruling and notifies the party offering it that it will be admitted.

SAME.—Error in the admission of evidence which is harmless to the party complaining thereof is not available as ground for a new trial, or on appeal to the Supreme Court.

SAME.—Husband and Wife.—Declarations of Wife.—The declarations of a wife concerning a material matter, made to her husband in the presence of a third person, in which he either directly or indirectly acquiesces, is not a confidential communication, but may be given in evidence against him.

SAME.—Error Cured by Instruction to Jury.—Error in the admission of evidence is not available as ground for a new trial, where, by the instructions of the court to the jury, they are directed to disregard it in the absence of other evidence rendering it material.

87	378
124	399
57	378
139	278
57	378
141	500
142	321
57	378
148	186
150	417

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SAME.—Instruction to Jury.—Error in refusing instructions asked to the jury is not available as ground for a new trial, where the court of its own motion gives proper instructions covering the same ground as those refused.

From the Wayne Circuit Court.

T. M. Browne, H. C. Fox and C. H. Burchenal, for appellant.

W. A. Bickle, J. P. Siddall, W. D. Foulke and T. J. Study, for appellee.

BIDDLE, C. J.—Suit by appellee, against appellant, for “wilfully, unlawfully and maliciously” burning a barn and its contents.

The complaint contains three paragraphs. Demurrers were sustained to the first and third paragraphs, and overruled to the second, upon which issue was formed by a general denial.

Proceedings in attachment were commenced simultaneously with the filing of the complaint.

The issues on the attachment, and on the second paragraph of the complaint, were submitted to a jury in the same trial, and a verdict found in favor of the appellee on both issues.

The case was commenced and tried in the court of common pleas. The verdict was found, causes for a new trial filed, and the case continued, on the last day of the term. Before the next term of the court of common pleas, the law transferring the business of that court into the circuit court took effect, and all subsequent proceedings were had in the latter court.

The motion for a new trial was overruled, judgment rendered, exceptions and appeal taken.

The principal errors insisted upon arise under the overruling of the motion for a new trial. The first ground alleged is, that the court erred in not permitting the appellant to prove his general good character in the defence. In support of this view, the appellant cites 1 Greenl. Ev., sections 54 and 55, but they do not seem to us to bear

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him out, as applicable to this case. In speaking of the admissibility of evidence of general character, Mr. Greenleaf says:

"In civil cases, such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it. * * * And in all cases, where evidence is admitted touching the general character of the party, it ought manifestly to have reference to the nature of the charge against him."

While Mr. Greenleaf states generally, that, "In actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it," he also says, that "It is not every allegation of fraud that may be said to put the character in issue; for, if it were so, the defendant's character would be put in issue in the ordinary form of declaring in *assumpsit*. This expression is technical, and confined to certain actions, from the nature of which, as in the preceding instances, the character of the parties, or some of them, is of particular importance. This kind of evidence is therefore rejected, wherever the general character is involved by the plea only, and not by the nature of the action. Nor is it received in actions of assault and battery; nor in *assumpsit*; nor in trespass on the case for malicious prosecution; nor in an information for a penalty for violation of the civil, police, or revenue laws; nor in ejectment, brought in order to set aside a will for fraud committed by the defendant."

Besides, one of the cases cited by Mr. Greenleaf (*Ruan v. Perry*, 3 Caines, 120,) has been frequently disapproved, denied as authority, if not directly overruled. In the case of *The Attorney General v. Bowman*, at Westminster, upon the trial of an information against the defendant for keeping false weights, and for offering to corrupt an officer, the defendant's counsel called a witness to character, but EYRE, Ch. B., said:

"I can not admit this evidence in a civil suit. The

offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not." *Huntley v. Luscombe*, 2 B. & P. 532, note a. *Fowler v. The Aetna Fire Insurance Co.*, 6 Cowen, 673; *Anderson's Ex'rs v. Long*, 10 S. & R. 55; *Humphrey v. Humphrey*, 7 Conn. 116; *Leckey v. Bloser*, 24 Pa. State, 401; *Lander v. Seaver*, 32 Vt. 114.

The case of *Porter v. Seiler*, 23 Pa. State, 424, was for an assault and battery inflicted by a knife; yet it was held, that evidence of the defendant's general good and peaceable character was not admissible to rebut malice. The general principle was therein laid down, that evidence of character is not admissible in civil suits, except when it is directly in issue, and where, from the nature of the issue, such evidence is of special importance; and it is immaterial whether the act charged be indictable or not.

In the case before us, it is apparent that the general character of appellant is not involved. Motive or intent constitutes no element in the wrong complained of. The injury is the same, whether committed with or without malice. True, the appellee charges the appellant with maliciously burning the barn and its contents, but it was not necessary to prove the malice. If he proved the burning to be unlawful, it was sufficient as to that part of the case. General good character is no defence to the particular act charged.

The cases cited by the appellant do not invade this general principle. *Byrket v. Monohon*, 7 Blackf. 88, was a case of slander for charging the plaintiff with perjury; plea, justification. Here character is put directly in issue, and the corrupt intent is necessary to the defence. The same in *Miles v. Vanhorn*, 17 Ind. 245.

In the case of *Hawn v. Wilson*, 28 Ind. 296, which was for slander founded on words charging the plaintiff with

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larceny, evidence of good character was held inadmissible, because there was no answer in justification putting character in issue; and in the case we are considering, as character was not put in issue, and was not involved in the nature of the charge complained of, we are of opinion that the court committed no error in rejecting the evidence. *Downey v. Dillon*, 52 Ind. 442; *Church v. Drummond*, 7 Ind. 17; *Jolly v. The Terre Haute Drawbridge Co.*, 9 Ind. 417.

The appellant offered to prove by Joseph Riprogle, a competent witness, that "the land described in certain deeds, given in evidence by the appellee, originally belonged to the witness, who was the father of the appellant's wife, and that the land was given to her as an advancement, though the deed therefor was executed in the name of the appellant; that, shortly before the execution of the deed by appellant, the witness had gone to him and told him that the land was a gift to his daughter as a provision for her, and it was not right that the land should be in danger of being taken for liabilities of appellant, and insisted that he [appellant] should execute a deed, so as to vest the legal title in the wife; that appellant at first, and for some time, refused to make such deed, but finally, at the urgent solicitation of witness, consented to do so, and that it was in pursuance of such solicitation and consent, that the deeds so introduced by appellee were executed."

This evidence was objected to by the appellee, and the objection was sustained by the court.

This ruling was made on Tuesday, and on the morning of Wednesday, before the trial was resumed, the court announced, "that it would permit the appellant to recall Joseph Riprogle, who was then in attendance as a witness, and that said witness should be permitted to give in testimony any conversation between appellant and witness prior to the sale of the property by appellant to the

witness, and at the time of such sale, relative to the inducements to such sale, or the motives for making it.”

The appellant did not avail himself of the offer by the court to correct the alleged error, either in whole or in part. We think, therefore, he ought not to be allowed to correct it here. True, he had propounded certain questions to the witness Riprogle, which might have called out evidence wider than that proposed to be offered, and to which objections were sustained; but we think what the court offered to allow him to prove was substantially the same as that which he offered to prove; and this was as wide as his exception could go. It seems as if he would rather have the alleged error in the record than the evidence which he offered. He should have recalled the witness and asked him such questions as he chose, subject to the objections of the opposite party and the rulings of the court; and, not having done so, there is nothing in the alleged error of which he can fairly complain.

The appellee asked a witness, Joseph Rodgers, if Mrs. Gebhart said or did any thing in the presence or hearing of Gebhart during a certain conversation, and if so, what it was.

To this question the appellant objected, but his objection was overruled, and the witness answered:

“Ma and Mrs. Gebhart were sitting, one to my right and the other to my left, by the stove, eating apples. In his conversation, she shook her head, but he didn’t see it; and she nudged the leg of the stove with her foot to attract his attention, and he looked up. She said, ‘You talk too much; if you had’nt talked so much, we wouldn’t have been in the trouble we are now in.’ He then stopped talking on that subject, and branched off on some courting scrape.”

Assuming that this Mrs. Gebhart was the wife of the appellant, which does not appear by the question and answer, we can not perceive any available error in the ruling.

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It is true, that a wife can not give testimony either for or against her husband, nor can her admissions or statements be received as evidence either for or against him, yet these statements, having been made to a third person, and not in confidential relations between husband and wife, the majority of the court are of the opinion that they were properly admitted; and in this instance, even if inadmissible, the remarks of Mrs. Gebhart were so trivial in themselves, so remote from the issues, and not having elicited any answer from the appellant, that we do not think their admission constitutes a substantial error.

The law does not concern itself about trifles. Besides, the court, in its fourteenth instruction to the jury, expressly told them, that "The mere statement of the wife or another person, no matter how directly such statement charges the defendant with a crime, can not be evidence against him. It can become evidence against him only by his adopting it, or acquiescing in it by words, or by an acquiescence inferable from silence." The slight irregularity, if any, in admitting the statement of the wife, is fully corrected by this instruction. *Pierce v. Goldsberry*, 35 Ind. 317.

The appellant excepted to the refusal of certain instructions to the jury, and also to the giving of certain instructions by the court. We have carefully examined the instructions throughout, and concluded that if any instructions were refused which ought to have been given, they were given by the court on its own motion; and that none of the instructions given were erroneous. Indeed, it seems to us, upon a full view of all the instructions, that, taken together, they were extremely liberal toward the appellant.

Some other exceptions were taken in the record and assigned amongst the errors, but as they were not discussed by the appellant in his brief, we do not examine them. *Payne v. McClain*, 7 Ind. 139; *Proctor v. Owens*, 18 Ind. 21.

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The appellee insists that the bill of exceptions has not been made a part of the record, and, therefore, that the alleged errors are not properly reserved. Upon this point we have some doubts; but, while we must hold our system of practice intact,—for it is the very fence of justice, and the guide to right,—we yet prefer to examine a case on its merits, when they can be reached without an infringement of necessary rules, rather than to let it go off on some technical defect; more especially so, when the conclusion must be the same by either method.

The foregoing opinion, affirming the judgment in this case, was delivered at the last term of the court. On petition, all the members of the court not being fully satisfied upon the question of admitting evidence of the general good character of the appellant in his defence, a rehearing was granted. On a careful reconsideration of the question, we have concluded to adhere to the original opinion.

We can not perceive that the general character of the appellant was in issue, and, that being the case, the evidence was properly rejected.

In every criminal case, the State, as the plaintiff, puts in issue either the life, liberty or reputation of the defendant, and in such cases, in favor of life, liberty or reputation, evidence of the general good character of the defendant is admissible, but the general rule in civil cases is, that evidence of general good character is not admissible. It is never admissible unless necessarily made so by the nature and character of the case.

We believe there is no case to be found of trespass between private parties wherein such evidence was admitted, however unwarrantably or maliciously the act might have been committed. In such cases, it is uniformly rejected.

This case is simply one of trespass, and it is immaterial

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to the right of the injured party, whether the act was done maliciously, carelessly or by accident, if it was unlawful. The fact that the appellee alleged the act to have been done maliciously does not alter the character of the case. The averment is mere surplusage; the malice need not be proved; nor is it of the least consequence whether the act was done by a person of good character or bad character. The damages are not punitive; they are compensatory only.

In addition to the authorities heretofore cited in this case, the following, we think, fully sustain our views: *Ward v. Herndon*, 5 Porter, 382; *Morris v. Hazelwood*, 1 Bush, 208; *Schmidt v. New York, etc., Ins. Co.*, 1 Gray, 529; *Smets v. Plunket*, 1 Strob. 372; *Lockyer v. Lockyer*, 1 Edmonds, 107; *Boardman v. Woodman*, 47 N. H. 120; *Gutzwiller v. Lackman*, 23 Mo. 168; *Wright v. McKee*, 37 Vt. 161; *Gough v. Herring*, 16 Wend. 646; *Thayer v. Boyle*, 30 Me. 475; Wharton Ev., sec. 47.

The judgment is affirmed, with costs.

MEIER V. THE STATE.

LIQUOR LAW.—Indictment.—Retailing without License.—Who may grant License.—An indictment for retailing intoxicating liquor without license charged, that the sale complained of had been made by the defendant, without having "procured a license therefor from the board of commissioners," etc.

Held, on motion to quash, that, on appeal from the decision of a board of commissioners on an application for such license, the circuit court may grant the same to the applicant, and that therefore the indictment is insufficient.

From the Randolph Circuit Court.

J. A. Engle, L. L. Study, J. N. Templer and R. S. Gregory, for appellant.

C. A. Buskirk, Attorney General, for the State.

57	386
124	384
57	386
146	225

Meier v. The State.

PERKINS, J.—Indictment for retailing without license.

Conviction, fine of twenty-five dollars, and appeal to this court.

A motion to quash the indictment was overruled, and exception taken.

The charge in the indictment is as follows:

"That one Conrad Meier, late of said county, on the 19th day of May, 1877, at said county and State aforesaid, did then and there unlawfully sell, for the purpose of gain, for ten cents, spirituous and intoxicating liquor, in a less quantity than a quart at a time, to wit, two gills thereof, he, the said Conrad Meier, not having then and there procured a license therefor from the board of commissioners of said county, contrary," etc.

Bearing upon the subject of license, our statute contains the following provisions, viz.:

"Sec. 31. From all decisions of such commissioners there shall be allowed an appeal to the circuit or common pleas court by any person aggrieved." 1 R. S. 1876, p. 357.

"Sec. 36. All appeals thus taken to the circuit or common pleas court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original cause.

"Sec. 37. Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises."

There is nothing in the liquor law changing, or modifying, or at variance with, the provisions of the statute above quoted.

Taking the provisions of the liquor law and those above copied together, they show that there are two authorities from which a license to retail may, in certain contingencies, be obtained, viz., the board of county commissioners and the circuit court.

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By the rules of criminal pleading, the averments in an indictment should be broad enough to negative the existence of a license from either authority. Had the indictment, in this case, alleged the sale to have been made, the seller not having a license to retail, it would have contained such negative. But that is not the averment. The averment in this indictment is, that he had not procured a license from the county commissioners. Such an averment does not negative the fact that he had a legal license to retail, but rather implies that he might have had one from the court. The averment is a negative pregnant.

The motion to quash should have been sustained.

The judgment is reversed, cause remanded, etc.

67	398
138	505
67	398
163	118

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JURY.—*Trial by.*—*Constitutional Law.*—The provision of section 20, article 1, of the constitution of this State, that the "right of trial by jury shall remain inviolate," was adopted in reference to the common-law right of trial by jury.

SAME.—*Partition.*—*Report of Commissioners.*—*Action to Review.*—Neither party, in an action to review the report of commissioners partitioning real estate, can demand a trial by jury as of right.

From the Clinton Circuit Court.

J. C. Suit and *J. E. Cowan*, for appellant.

H. McClurg, *J. V. Kent*, *A. E. Paige* and *S. O. Bayless*, for appellee.

BIDDLE, C. J.—Complaint to review the report of commissioners in partitioning real estate.

The action was commenced in December, 1874, to review proceedings which were had in April, 1872. A demurrer was overruled to the complaint, answer filed, and issues of fact joined.

Allen v. Anderson.

Upon the trial, the appellant demanded a jury, which the court refused. He excepted; and this presents the only question discussed by the appellant in his brief, and therefore the only one we shall notice.

Our constitutional guaranty of the right of trial by jury is in the following words:

"In all civil cases, the right of trial by jury shall remain inviolate." Art. 1, sec. 20.

This provision of the constitution was adopted in reference to the common-law right of trial by jury, as the language plainly imports, namely, that the right "shall remain inviolate," that is, *continue* as it was. The words "in all civil actions" mean, in all civil actions at the common law—as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc. In chancery cases or suits in equity, to which the present action would have belonged at the time the constitution was adopted, and before our present code of procedure was enacted, trial by jury, as a right, did not exist. Issues of fact, in such cases, were sometimes sent to a jury for trial, "to inform the conscience of the chancellor," as the legal phrase ran; but trial by jury before the chancellor was not a right that either party could demand. There are many cases, of course, besides common-law civil cases, in which the right of trial by jury is granted by statute, but the case before us is not one of that class.

In the case of *Dillman v. Cox*, 23 Ind. 440, it was held, that, in filing exceptions to the report of commissioners in partitioning lands, the parties were not entitled to a trial by jury, as a right; and we think the present case stands upon the same ground.

The court below committed no error against the appellant.

The judgment is affirmed, with costs.

 Shelby Township, Tippecanoe County, v. Randles.

SHELBY TOWNSHIP, TIPPECANOE COUNTY, v. RANGLES.

DOG TAX FUND.—*Sheep.—Mandate.*—Mandate against the township trustee is not the proper remedy against the township by the owner of sheep which have been killed by dogs.

SAME.—*Township Liable.—When.*—Where such trustee has in his hands funds derived from the dog tax, which he refuses to apply to the payment of just claims for sheep killed by dogs, the township is liable to the owner of such sheep, in an action by him for the value thereof.

SAME.—*Priority of Claims.*—Such claims must be paid in the order of their priority, out of such fund, as it is collected from year to year, it not having been intended by the Legislature that such fund for each year should satisfy such claims only as accrued in that year.

From the Tippecanoe Circuit Court.

J. M. Larue and F. B. Everett, for appellant.

M. Jones, J. L. Miller and — Rising, for appellee.

BIDDLE, C. J.—The appellee sued the appellant, under the act of March 2d, 1865, (1 R. S. 1876, p. 69, sec. 4,) for damages sustained for sheep killed by dogs.

The township trustee executed to the appellee the following certificate:

“SHELBY TOWNSHIP, MONTMORENCY, June 18th, 1878.

“This certifies, that there is owing to Benjamin Randles fifty-two dollars (\$52.00) from sheep fund, as per statement on file in my office.

“R. G. McQUEEN, Trustee Shelby Towns.”

The complaint sets forth the certificate above, and avers, that, ever since the making of the certificate, there has been, and now is, sufficient money in the hands of the trustee, belonging to the “sheep fund,” so-called, to pay the certificate. Wherefore, etc.

Other formal averments are properly made.

A demurrer to the complaint, stating as ground the insufficiency of the facts alleged, was overruled, and exception reserved.

Answer; trial by the court; finding and judgment for the appellee.

57	390
140	421
57	390
150	171
57	390
155	7

Shelby Township, Tippecanoe County, v. Randlea.

At the trial, the certificate was introduced in evidence, and the following additional facts admitted by the parties:

"That R. G. McQueen was, in 1873, trustee of Shelby township, has been ever since, and still is, such trustee; that for the year beginning March 1st, 1873, and ending March 1st, 1874, he, as such trustee, received one hundred and thirty-five dollars and forty-one cents of the 'sheep fund,' and paid out one hundred and forty-two dollars and sixty-five cents; that the plaintiff had valid claims against the fund, during that year, for ninety-two dollars, in two items, one of forty dollars and one of fifty-two dollars; that the trustee gave the voucher sued on; that the whole amount of valid claims for that year was three hundred and twenty-six dollars and fifty cents; that plaintiff received forty dollars on his claims; that, in the year commencing March 1st, 1874, the trustee received one hundred and fifty-four dollars and thirteen cents belonging to that fund; that the claims for sheep killed amounted to one hundred and forty-seven dollars and thirteen cents for that year, which was paid out to the claimants; that, for the year commencing March 1st, 1875, he received one hundred and fifty dollars and three cents, and the sheep killed, for which claims have been allowed that year, will consume the whole amount. This was all the evidence in the case."

In support of its demurrer, the appellant insists:

1. That, if the appellee had a claim on the fund, the only remedy was against the township trustee by mandate.

In this view, we think it is mistaken. A mandate will not lie when there is any other legal remedy; nor to compel the performance of a discretionary act.

2. That the township can not be held liable, in such cases, without an express declaration of such liability by the Legislature.

It is sufficient answer to this, to say, that the Legislature does not declare the liability of the township in all classes of cases. The township is a corporation which is author-

Shelby Township, Tippecanoe County, v. Randles.

ized to sue, and is liable to be sued; and if it has money in its hands, belonging to any other person, which it will not pay over, it may be sued, and must be held liable like any other person.

3. That the complaint should aver a sufficiency of this fund, for the year ending March 1st, 1874, to pay the plaintiff's claim.

That is, if we understand the argument, the dog tax of each year must pay the claims for sheep killed the same year; and if the claims for any year exceed the amount of the tax for the same year, the claims must go unpaid. We do not think this would be a fair construction of the act, unless the dogs will agree to kill no more sheep each year than can be paid for by the amount of the tax for the same year. If they were to kill no sheep during a given year, all of the dog tax for that year over fifty dollars—according to the provisions of section 4 of the act—would go to the school revenue of the township; then if they should, the next year, kill twice as many sheep as the dog tax would pay for, the school revenue would have the money, and the claims for sheep killed would go unpaid. This is not the meaning of the act. Its main purpose is to make the dog tax pay for the sheep killed. Its secondary purpose is, when the dog tax is not required to pay for the sheep killed, to give it to the school revenue. The sheep must be paid for first, in the order in which the claims are made, without reference to the year in which they are killed, or the year in which the tax is collected; then the surplus over fifty dollars, if any, must be paid to the school revenue.

The demurrer was properly overruled.

By a motion for a new trial, and the proper exceptions, the appellant has presented the question of the sufficiency of the evidence to support the finding. The facts admitted show that the township has, or has had, money in its hands, out of which the appellee's claim should have

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been paid, in preference to those which subsequently accrued.

The evidence, in our view of the case, supports the finding.

We can not perceive that the case of *Maloy v. Madget*, 47 Ind. 241, affords the least support to the views of the appellant, although it is cited. The questions presented in this case were not involved in that case. The direction in which that case points, however, is against the appellant.

The judgment is affirmed, with costs.

DONELLAN ET AL. v. HARDY.

SUPREME COURT.—*Pleading, Sufficiency of.*—*Failure to Object Below.*—*Defects*

Owed by Verdict.—Where no objection by demurrer, motion to make specific or motion in arrest is presented to a complaint which, though defective in some of its averments, states facts sufficient to render a judgment thereon a bar to another action, such defects are cured by the verdict, and can not be presented to the Supreme Court by an assignment of error that the complaint is insufficient.

EVIDENCE.—*Judgment of Supreme Court.*—*Indiana Reports.*—The printed report of a decision of the Supreme Court, issued by authority of law, is not competent original evidence of a judgment rendered by such court in any cause.

SAME.—*Proving Judgment of Supreme Court.*—*How.*—The judgment rendered by the Supreme Court in the decision of a cause may be proved by a transcript of such judgment, properly attested by the clerk of such court, under the seal thereof, or by the record of such transcript in the order book of the court from which such cause was appealed, where the same has been certified down according to law.

SAME.—*Secondary Evidence.*—Secondary evidence of a judgment rendered by the Supreme Court can not be admitted without evidence of the destruction of the record of such judgment in said court.

SAME.—*Petition for Rehearing Overruled.*—*Notice.*—The fact that a petition for a rehearing of a cause decided by the Supreme Court has been overruled can not be proved by a notice of that fact, given by the clerk of such court to the clerk of the court from which such cause was appealed.

57	393
142	661
57	393
152	467
57	393
166	607

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SAME.—*Partnership.—Individual Debts of Partner.—Levy on Partnership Property.—Injunction.—Judgment.—Receiver.—Estoppel.*—An execution creditor of an individual member of a copartnership, having caused property of such copartnership to be levied on by an officer, to satisfy his debt, was, together with such officer, on application of another partner, temporarily enjoined from making sale until the partnership debts had been paid, and directed to deliver such property to a receiver appointed in such proceeding to settle the partnership affairs. On appeal by such creditor alone to the Supreme Court, such injunction was reversed as to him, and the cause remanded for further proceedings. Such receiver having subsequently sold such property and reported a distribution of the proceeds of the sale to the partnership creditors, such execution creditor instituted an action against such copartner and his surety, on the bond executed by them to procure such injunction, to recover damages resulting therefrom. *Held*, that, no reversal of such injunction having been obtained as to such officer, or as to the appointment of such receiver, and such creditor having continued to be a party to such action, resulting in the sale of such property and the distribution of the proceeds thereof, the judgment therein rendered after such reversal, the reports of such sale by the receiver, and the approval thereof by the court, were competent evidence against, and bound, him.

SAME.—*Interest of Individual Creditor in Partnership Property.—Levy.—Lien.*—By the levy of his execution upon partnership property, the creditor of an individual partner acquires no interest whatever in the property itself, but only a lien for the share of such partner, individually, in the surplus remaining after all partnership debts and prior liens shall have been paid.

From the Madison Circuit Court.

J. A. Harrison, for appellants.

W. R. Pierse and *H. D. Thompson*, for appellee.

Howk, J.—In this action, the appellee was plaintiff, and the appellants were defendants, in the court below.

In his complaint, the appellee alleged, in substance, that on the 10th day of August, 1868, in the court below, he had recovered a judgment against one Leonard Harri-man for the sum of six hundred and seventy-three dollars and sixty cents, and costs of suit taxed at six dollars and sixty-five cents, which judgment remained unpaid, unreversed, and in full force; that on the 27th day of February, 1869, there was in the hands of the sheriff of Madison county, Indiana, to be executed by him, an execution issued

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on said judgment, out of the clerk's office of said court, which execution was on said day levied by said sheriff upon personal property, owned by said execution defendant and the appellant Donellan, and held by them as partners; that on said last-named day they obtained an order from the judge of said court, restraining and enjoining said sheriff and the appellee from in any wise selling or disposing of said property so levied upon, and from selling the same on said execution; that, to procure said order and injunction, and pursuant to the statute in such case provided, the appellants executed their writing obligatory, a copy of which was filed with said complaint, whereby the appellants undertook and bound themselves to pay to the appellee all damages he might sustain, if such restraining order and injunction should be wrongful; that said property, so held and owned by said firm of Harriman & Donellan, in said county, at the date of said bond, and which was subject to said execution, was of the value of twelve hundred dollars, and that the property levied on by said sheriff, by virtue of said execution, was of the value of twelve hundred dollars; that, by virtue of said injunction and restraining order, the said sheriff was compelled to, and did, surrender up the property so levied on by him, and he did release his said levy; and that said property, under said order of said court, had been disposed of and removed beyond the reach of said sheriff, or the sheriff of said county; that said Harriman had become, and was, wholly insolvent, and there was no property of said firm of Harriman & Donellan, out of which any part of appellee's said judgment could be made; that the appellee appealed from said restraining order of said court to the Supreme Court of this State, and that, by the judgment of said Supreme Court, rendered in said cause on January 30th, 1871, the said restraining order of the judge of the court below was in all things reversed and held for naught; and the appellee said, that by means of the premises he

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had sustained damages in the sum of one thousand dollars, for which and for other proper relief he demanded judgment.

To this complaint, the appellants jointly answered in five paragraphs, as follows:

First. A general denial.

Second. In the second paragraph of their answer, the appellants alleged, in substance, that at the time of the said supposed and pretended levy, by said sheriff, upon the said property of the said firm of Harriman & Donellan, of the said value of twelve hundred dollars, the said firm of Harriman & Donellan was justly indebted to the First National Bank of Anderson, Indiana, in the sum of fifteen hundred dollars, upon promissory notes executed by said firm, and to other persons in the sum of two thousand dollars, all of which was justly due from, and owing by, said firm; that an action was brought and prosecuted by said First National Bank thereon, and judgment rendered against said firm, in the Madison Common Pleas Court, on the 26th day of June, 1869, for one thousand six hundred and thirty-nine dollars and sixty cents; and the appellants averred, that every part and parcel of said property had been applied in payment of the debts of said firm, and was insufficient to satisfy the said debts, and that a large amount of the debts of said firm yet remained unpaid; and that the actual interest of said Harriman in said property, at the time of said supposed levy, was of no value whatever. Wherefore appellee had not been injured by reason of said restraining order.

Third. In the third paragraph of their answer, the appellants alleged, in substance, that, at the time of the said supposed and pretended levy upon the said property of the said firm of Harriman & Donellan, said firm was largely indebted, as a firm, to wit, in the sum of thirty-five hundred dollars; that said partnership property was not sufficient to pay said partnership debts, and that the

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actual interest of said Leonard Harriman in said partnership property was of no value whatever.

Fourth. The appellants alleged, in substance, in the fourth paragraph of their answer, that, after the making of the said supposed levy by said sheriff, as set forth in appellee's complaint, the appellant Nelson Donellan commenced an action, in the court below, for an accounting and final settlement of the matters of said firm, and distribution of its assets among the several parties, according to their respective equities, to which action he made the appellee a party defendant; that, in said action, an accounting was ordered, and John W. Westerfield was appointed a receiver, and all the effects of said firm were placed in the hands of said receiver by the decree of said court, at its — term, 1871, which judgment and decree remained in full force and wholly unreversed, and a copy thereof was filed with said answer; that, in accordance with said judgment, said firm property was disposed of by said receiver, and the proceeds applied in payment of the debts of said firm according to law, all of which was, and had been, in all things, fully confirmed by said court; and that a large portion of said partnership debts, to wit, one thousand dollars, remained unpaid and unsatisfied; and that the interest of said Leonard Harriman, if he should have any, after said partnership debts were paid, was, by the order of said court, to be paid to the appellee and the other creditors of said Harriman. Wherefore the appellee had not been damaged, and was estopped from pursuing any claim for damages until said property was fully administered on by said receiver.

Fifth. And in the fifth paragraph of their answer, the appellants alleged, in substance, that on the — day of —, 1871, the appellant Nelson Donellan commenced an action, in the court below, to have and procure the application of the partnership property of said firm of Harriman & Donellan applied in payment of their partnership debts, and to procure the appointment of a re-

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ceiver, to which action the appellee and said Harriman were made defendants, a copy of which proceedings was filed with this answer; that the said action embraced all the property and rights of property involved and mentioned in appellee's complaint; that the court below took jurisdiction, and proceeded in said matter to settle all the rights of the appellee and the appellants,—the appellee seeking to reach said partnership property, with an execution against the said Leonard Harriman only, for his own individual debt; that the said action was still pending in the court below, which had exclusive jurisdiction of all said matters in said action; that the writing obligatory, sued on in this action, was executed for no other purpose than to procure an injunction therein; and that there was no judgment or order of said court, adjudging to the appellee any right whatever in said property. Wherefore the appellants said, that no cause of action had accrued to the appellee on said bond, and that the appellant David W. Swank executed said bond as surety for his co-appellant, and not otherwise.

The appellee replied by a general denial to the second, third, fourth and fifth paragraphs of appellants' answer.

And, for a further reply to the fourth and fifth paragraphs of said answer, the appellee said, in substance, that it was true, that the proceedings therein referred to, wherein Nelson Donellan was plaintiff, and Leonard Harriman and others were defendants, in the court below, were commenced, as therein alleged; but the appellee said, that from the decree and decision of the court below, in the appointment of said receiver, and in the restraining of said sheriff from selling said property, the appellee and the sheriff appealed to the Supreme Court of this State; and that said Supreme Court, on the — day of —, 1871, in all things reversed said decree and declared the same of no effect whatever; and that all said proceedings, referred to in said fourth and fifth paragraphs of answer, of said court below, and the acts of said Westerfield as

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receiver by the appointment of said court, were null and void, and in contempt of the order and decree of said court, and therefore of no validity whatever.

And this action, being at issue, was tried by a jury in the court below, and a verdict was returned for the appellee, assessing his damages at six hundred and seventy-three dollars and sixty cents. And, on written causes filed, the appellants jointly moved the court below for a new trial, which motion was overruled, and to this decision the appellants then excepted. And judgment was rendered on the verdict by the court below, from which judgment this appeal is here prosecuted.

In this court, the appellants have assigned the following alleged errors:

1st. That the appellee's complaint, in this case, does not state facts sufficient to constitute a cause of action; and,

2d. That the court below erred in overruling the appellants' motion for a new trial.

We will consider and decide the questions presented by these alleged errors in the order of their assignment.

It will be seen that the sufficiency of the facts stated in appellee's complaint, to constitute a cause of action, is called in question for the first time in this court. The appellants did not demur to appellee's complaint, nor did they move for any order requiring the appellee to make his complaint, or any of its averments, more certain or specific, in the court below; but after verdict and judgment, and without even a motion in arrest of judgment, the appellants urge their objections to the complaint in this court. This, of course, the appellants had the right to do under our code of practice, and we do not complain of it. But many objections to a complaint may be cured by the verdict, and parties may lose all benefit from their objections by not making them at the proper time. And so it is with the objections urged by the appellants to the complaint in this case. If these objections had been made

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in the proper manner and at the proper time, and if these objections, thus and then made, had been overruled by the court below, and proper exceptions had been saved to such rulings, then the objections might possibly have been available to the appellants in this court, if the rulings of the court below were held to be erroneous.

But as the record of this cause is now made up, if we should find that the verdict of the jury was sustained by sufficient evidence, and that there were no errors of law occurring at the trial and excepted to, we would be bound to hold that such verdict cured all the alleged defects in the complaint, for the reason that sufficient facts are stated in the complaint to render the judgment thereon a complete bar to any other suit for the same cause of action.

We now come to the consideration of the questions presented by the second alleged error, the overruling by the court below of the appellants' motion for a new trial. Several causes were assigned by appellants for such new trial, most of which relate to alleged errors of law occurring at the trial, and excepted to by the appellants. These alleged errors of law we will consider in the order of their probable occurrence on the trial of this cause, rather than in the order of their assignment.

But, before proceeding to the consideration of these errors of law, we deem it necessary to a proper understanding of our decisions that we should first give a brief summary of the facts which gave rise to this action, as we gather the same from the record.

In October, 1867, the appellant Nelson Donellan and one Leonard Harriman formed a copartnership in the business of manufacturing and selling certain medicines and bitters, in which copartnership the mode of manufacturing such medicines and bitters was known only to said Harriman, and the cash capital of the concern was chiefly supplied by the appellant Donellan. This copartnership was continued until about March 1st, 1869. On August

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12th, 1868, the appellee Hardy recovered a judgment in the court below against the said Leonard Harriman, for six hundred and seventy-three dollars and sixty cents, for his individual debt, and costs of suit. On December 5th, 1868, the appellee Hardy sued out, and placed in the hands of the sheriff of Madison county, an execution on his said judgment, against said Leonard Harriman. By virtue of said execution, the said sheriff, on February 23d, 1869, levied upon and seized the property of said copartnership, and advertised the same for sale on the 8th day of March, 1869. After said levy, on February 26th, 1869, the appellant Donellan commenced a suit in the court below against his copartner Harriman, the appellee Hardy, the sheriff of said county, and others, praying therein for a dissolution of said copartnership, a settlement of its business and accounts, the appointment of a receiver, an injunction against the defendants, and a temporary restraining order, and other proper relief. On the 27th day of February, 1869, in said suit, in vacation, the judge of the court below appointed J. W. Westerfield receiver of the said property of the said copartnership, and authorized him to take possession of said property and sell and dispose of the same, and collect and pay the debts of the firm, and report his proceedings to the court below; and the appellee Hardy, the sheriff, and others were restrained by the order of said judge from selling said copartnership property until the further order of the court below, on the second day of its next succeeding term. And, to procure said restraining order, the bond or undertaking now in suit was executed by the appellants, and approved by the judge of the court below. From said temporary restraining order of the judge of the court below, the appellee Hardy appealed to this court; and the said restraining order, so far as it related to the appellee Hardy, was reversed by this court at its November term, 1870. *Hardy v. Donellan*, 33 Ind. 501. And afterward, on April 29th 1871, the

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appellee Hardy commenced this action against the appellants, in the court below, on the aforesaid bond or undertaking.

With this brief history of the origin of this action, we will now consider the alleged errors of law occurring at the trial of this cause, and excepted to, and which were assigned as causes for a new trial in appellants' motion therefor, in the court below.

The twelfth cause for a new trial, assigned in the appellants' motion therefor was as follows:

"12th. Because of error of law occurring at the trial, in this, the court overruled the defendants' objections to printed book and volume 33 of the Indiana Reports of the decisions of the Supreme Court of Indiana, which the plaintiff offered as evidence, and proposed and offered to read in evidence from said printed book, on page 501, the report of the opinion of the Supreme Court in the case of *Hardy v. Donellan*, and, over defendants' objections, the court permitted the plaintiff to read the same to the jury in evidence, to which the plaintiffs excepted at the time."

It appears from a bill of exceptions, which is properly in the record, that the appellee first proved, by the clerk of the court below, that he had searched among the papers of the clerk's office and could not find the opinion of the Supreme Court in said case of *Hardy v. Donellan*; and that there was no evidence or showing that he could find upon the records of the court below that the opinion ever was filed in his office, in said case, and no opinion was to be found on the records of said court. And, having made this proof, the appellee offered in evidence the printed report of the opinion of the Supreme Court, in printed volume 33, on page 501, of the Indiana Reports, to the reading of which the appellants objected at the proper time, for the alleged reasons, then stated, "that said printed report is not legal or competent evidence to prove the judgment of the Supreme Court, that the same is not

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certified by the clerk of the Supreme Court, and attested with the seal of the court, to be a true and correct copy of the judgment of the Supreme Court in the cause; that it has attached to it no attesting certificate of the clerk of the Supreme Court, and is not shown by any competent proof to be a true copy of said judgment, and because no proper foundation is laid to admit it."

These objections having been overruled by the court below, and an exception saved to this ruling, the said printed report of the opinion of this court was admitted in evidence.

It is very clear to our minds, that the appellants' objections to this evidence were well taken. It was necessary that the appellee, under the averments of his complaint, should prove by competent evidence, that the restraining order of the judge of the court below, in the original case of *Donellan v. Hardy et al.*, had been in all things reversed and held for naught by the judgment of this court. This was a fact alleged by the appellee and denied by the appellant. It was incumbent on the appellee to establish the fact alleged, by the best competent evidence for that purpose. In our opinion, the fact that a particular judgment has been rendered by this court can only be proved by a transcript of the judgment, with the certificate of the clerk, attested by the seal of this court, or by the record of such certified transcript in the proper order book of the court below, if the same has been there recorded, or, perhaps, though we need not, and do not, so decide, by a copy of such record, duly certified by the clerk, under the seal, of the court below. Certainly, it seems to us, the printed reports of the decisions of this court, and of the opinions delivered in announcing the decisions, are not competent evidence, for the purpose of proving any matter of fact. These Reports may evidence the law of this State, as the same is construed and declared by this court, but they are not competent evidence, and ought not to be admitted as

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such, of the fact that such a judgment was rendered in such a case. No sufficient ground was shown by the appellee for the introduction of secondary evidence of the judgment of this court. The fact that a particular transcript of the judgment had been mislaid or could not be found on search, or, perhaps, had never been filed, would not justify the introduction of secondary evidence of the judgment. While the judgment remained of record in this court, the appellee could readily obtain original competent evidence of such judgment, by application to the clerk of this court for a duly certified transcript of such record. It seems to us, that the only evidence which would have justified the court below in admitting the printed report of the case, as evidence of the judgment of this court, would be evidence of the destruction of the record of said judgment remaining in this court.

We hold, that the court below erred at the trial in admitting in evidence the printed report of the case of *Hardy v. Donellan*, 33 Ind. 501, for the purpose of proving the judgment of this court in said case.

The eleventh cause for a new trial, in the appellants' motion therefor, was alleged error of law occurring at the trial, in this, that the court below, over the appellants' objection and exception saved, permitted the appellee to give in evidence a notice from the clerk of this court to the clerk of the court below, of the overruling of a petition for a rehearing by this court in the said case of *Hardy v. Donellan*. If this notice was given in evidence for the purpose of proving the judgment of this court, and we know of no other purpose for which it could have been put in evidence, it seems to us that it was clearly incompetent. As we have already seen, the judgment of this court in that case could only be proven by a duly certified transcript of the judgment, or by the record of such transcript in the court below, if the same was there recorded.

We need not elaborate this point, as we have already

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said all that we wish to say in regard to it. In our opinion, the court below erred in admitting said notice in evidence.

The appellee gave in evidence the complaint in the original suit, in which the restraining order was granted, and also such restraining order or injunction. In said complaint, the appellant Donellan in this case was the sole plaintiff, and the appellee Hardy and several others were defendants. It appeared from the restraining order in evidence, that the appellee and two others, one of whom was the sheriff of Madison county, were enjoined from selling the property described in the complaint, which had been levied on by said sheriff, under an execution in favor of the appellee. It also appeared from said order, that John W. Westerfield was therein appointed a receiver, and was thereby authorized, upon giving bond in the sum of seven thousand dollars for the faithful discharge of his duties, "to take possession of, sell, dispose of, collect, and pay all debts of the firm, and report his proceedings in the premises to this court."

The appellee, it would seem, made no complaint of this order appointing Westerfield receiver, on his appeal to this court, but the same remained unreversed and in full force. Appellee also proved by the sheriff, that Westerfield, as such receiver, took possession of the said property. When the appellee obtained a reversal of the restraining order as against himself, he was not thereby dismissed or excluded from the original suit; but he remained a party thereto, and, in our opinion, he was bound and concluded by the reports of the receiver, and the action and orders of the court below thereon.

If the action and orders of the court below on the receiver's reports were wrong, and injuriously affected the interests of the appellee, he had, or might have had, his remedy therefor. But he was a party to the record, and, while it remained in force, the record was legitimate and competent evidence against as well as for him.

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When, therefore, at the proper time, the appellants offered in evidence the proceedings in the original suit, to which the appellee was a party subsequent to the restraining order therein, the reports of the receiver, and the orders of the court approving and confirming such reports, we think that the evidence thus offered was clearly competent, and ought to have been admitted. These proceedings were a part of the same record of the same court, in the same suit in which the appellee was a party defendant, a part of which record the appellee, as we have seen, had already given in evidence. Certainly, we know of no rule of evidence which would, or ought to, preclude the appellants from giving in evidence the remainder of such record. When the appellants offered in evidence the receiver's reports, and the orders of the court below thereon, the appellee's objections thereto were sustained, and the offered evidence was excluded, and to these decisions the appellants excepted. These rulings of the court below were assigned as causes for a new trial in the appellants' motion therefor addressed to the court below, and the correctness of these decisions is therefore fairly presented for our consideration.

In our opinion, the court below erred in excluding the evidence thus offered by the appellants.

It is a clear proposition, we think, that the appellee, by virtue of the levy of his execution against Harriman on the copartnership property of the firm, composed of said Harriman and the appellant Donellan, acquired only a lien upon the said Harriman's interest in said property, and upon nothing more. If there had been no restraining order, the sheriff could only have sold, under said execution and levy, the said Harriman's interest in said property, and nothing more. This interest was not an interest in the specific property, but it was an interest in what might remain of the partnership property after the payment of the copartnership debts, and after the satisfaction of the specific lien which the appellant Donellan

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had thereon "for his own amount or share of the capital stock and funds, and for all moneys advanced by him for the use of the firm." In other words, Harriman's share of the property was a share in what remained thereof, "after the full discharge and payment of all debts and liabilities of the partnership;" and this share was applicable to the payment of whatever was due from Harriman to the partnership, before any of it could be applied to the payment of his individual debts to the appellee, or any other creditor.

The law is, "that no separate creditor of any partner can acquire any right, title, or interest, in the partnership stock, funds, or effects, by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner, as his share or balance, after all prior claims thereon are deducted and satisfied." Story Partnership, sec. 97, and authorities cited.

We have thus stated some of the elementary principles of the law of partnership, because we think they are directly applicable to the case at bar, and because, also, it has seemed to us that the court below overlooked these principles in its instructions to the jury, and in its refusal to give the jury some of the instructions asked for by the appellants.

This opinion is already so extended that we merely advert to these instructions without examining them in detail, and must content ourselves with the preceding statement of some of the legal principles which we think are applicable to this case.

In our opinion, the court below erred in overruling the appellants' motion for a new trial.

The judgment of the court below is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

 Westerman et al. v. Foster et ux.

WESTERMAN ET AL. v. FOSTER ET UX.

CONVEYANCE NOT ACKNOWLEDGED.—*Record not Evidence.*—*Real Estate, Action to Recover.*—A conveyance of real estate, which has not been acknowledged by the grantor, is not entitled to be recorded, and, if recorded without such acknowledgment, the record is not admissible as evidence of title, in an action to recover the lands so conveyed.

SAME.—*Wabash and Erie Canal.*—*Trustees of.*—*Conveyance by.*—*Proof of Execution.*—Deeds of conveyance of real estate, purporting to be executed by the trustees of the Wabash and Erie Canal, are not admissible as evidence of title in the grantee, in an action by him to recover the possession of such real estate, upon evidence of the execution thereof by one only of such trustees; evidence of such execution by at least two of such trustees being necessary.

SAME.—*Pleading.*—*Amendment.*—*Amended Complaint.*—*Relief.*—*Judgment.*—By the filing of an amended complaint, the original complaint is superseded and forms no part of the record of, or issues in, the cause, and relief demanded in the latter, but omitted from the former, can not be granted by the finding or judgment.

From the Lake Circuit Court.

M. Wood, T. J. Wood and T. J. Merrifield, for appellants.

E. C. Field, E. Griffin and J. W. Youche, for appellees.

BIDDLE, C. J.—Complaint in the statutory form to recover the possession of land, with damages.

An answer in various paragraphs was filed, but no question is raised upon the pleadings. We do not, therefore, particularly state them.

Trial by the court, and finding that Burdett E. Foster, one of the appellees and the wife of George D. Foster, was owner in fee-simple of the lands described in the complaint, and entitled to the possession thereof, and for one hundred and fifty dollars damages; and, also, that a certain dam on the premises be abated.

Motion for a new trial overruled; exception; judgment on the finding, with costs, and an appeal to this court.

At the trial, the appellees offered in evidence the rec-

57	408
136	425
57	408
144	603
57	408
151	114

ord of a deed from the trustees of the Wabash and Erie Canal, signed D. M. Dunn and Thomas Dowling, conveying a portion of the lands in controversy to William H. Levering. To the introduction of the record of this deed as evidence the appellants objected, pointing out, as the ground of their objection, that the deed had never been acknowledged; but the court overruled the objection, and admitted the record of the deed in evidence. The appellants excepted to this ruling, assigned it as a cause for a new trial, and properly reserved their exceptions.

The record did not show that the deed had ever been acknowledged by the grantors. It was not such a conveyance as was entitled to be recorded. 1 R. S. 1876, p. 865, sec. 18. Not being entitled to be recorded, the record of it was not evidence. 2 R. S. 1876, p. 150, sec. 283. We think the court erred in receiving the record of the deed in evidence.

The records of two deeds from the trustees of the Wabash and Erie Canal to William W. Haney were also offered in evidence by the appellees, and objected to upon the same grounds by the appellants, but the court admitted them.

These rulings were also erroneous, for the reasons above stated. These conveyances were necessary links in the chain of the appellees' title.

The appellees next offered the original deeds above described, and called a witness to prove their execution, who testified :

"My name is Amos Allman; my occupation, abstracting; have been recorder and deputy-recorder of Lake county ten or fifteen years. I am acquainted with the signature of Thomas Dowling, one of the trustees of the Wabash and Erie Canal. The signature of the deed from the board of the Wabash and Erie Canal, which I hold in my hand," (deed No. 2761, as copied above,) "purporting

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to be the signature of the said Dowling, is his signature. I have recorded hundreds of these deeds from the board of trustees of the Wabash and Erie Canal, which were signed exactly like the one I hold in my hand. In case of all of those deeds, Dowling's signature was associated with the same signatures as it is in this deed. The signatures of the other two trustees were the same in all of those deeds as in the present one. I never saw Thomas Dowling personally; I never saw him write his name, but I have written letters to him, and have frequently received letters from him in answer to such as I have written to him. The signature to all these letters was the same as to this deed I hold in my hand. Dowling may have had a secretary, but I do not know that he did."

Upon this testimony, which it was agreed should apply to all the original deeds from the board of trustees of the Wabash and Erie Canal, the appellees offered the original deeds in evidence. Each one was objected to by the appellants, upon the ground that its execution had not been proved, but the objections were overruled and the deeds admitted as evidence. To each of these rulings, exceptions were reserved.

Perhaps the testimony of Allman would have been sufficient evidence to allow the deeds to go to the jury, if their execution by Dowling alone could give them validity; but the proof of Dowling's signature was insufficient to admit the deeds as evidence, without the proof of at least one other signature of one of the three trustees. As to any other signature than Dowling's, no evidence whatever was offered.

In our opinion, the court erred in admitting the records of the deeds in evidence, because the deeds had never been acknowledged; and also, in admitting the original deeds, because their execution by at least two of the three trustees had not been proved.

The first complaint filed in this case consisted of a

single paragraph, alleging title to the lands in the appellees, and that the appellants constructed and maintained a dam, head-gates and other obstructions to the natural flow of the water over and across said land, with a prayer for damages.

At a subsequent term of the court, a motion was filed by the appellants to compel the appellees to make their complaint more specific, which motion was confessed, and leave to amend the complaint granted. Whereupon the appellees filed the amended complaint first mentioned in this opinion. This amended complaint, which superseded the first and put it out of the record, is simply to recover the possession of the land, with damages, and contains no averment as to a dam, head-gates, or other obstructions. The appellants, at the time the court rendered the judgment, objected and excepted to its rendition in the form pronounced by the court, and have made this ruling one of their assignments of error.

We do not perceive how the court could properly render a judgment abating a dam, upon a complaint which contained no averment concerning a dam. The court must have based its finding and judgment upon the presumption, that the two complaints constituted but separate paragraphs of one complaint, but the record will not sustain this position. The amended complaint can not be held as merely making the original complaint more specific, nor as a second paragraph to the first complaint. It does not purport to make the first complaint more specific, nor to be an additional paragraph; indeed, it presents a wholly different cause of action, and purports to be an amended complaint, which supersedes the original complaint, and leaves it as if it was not in the record. This practice is well settled. See *Burnett v. Abbott*, 51 Ind. 254, and *Wyble v. McPheters*, 52 Ind. 393.

A question is made upon the weight of evidence, but we do not examine it, as we are of opinion that the judgment can not be sustained upon the complaint.

Hulett *et al.* v. Inlow *et ux.*

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

57	412
135	181
136	662

HULETT ET AL. v. INLOW ET UX.

CONVEYANCE TO HUSBAND AND WIFE.—*Tenants by Entireties.*—The portion conveyed to a husband and wife by a conveyance of real estate to them and a third person is held by them as tenants by entireties, though they be not described therein as husband and wife, and is not subject to execution for the debts of the husband.

SAME.—*Interest of Husband can not be Sold on Execution.*—*Injunction.*—An execution creditor of the husband, and the sheriff holding the execution, may be enjoined by the husband and wife from levying upon and selling real estate held by them as tenants by entireties.

From the Montgomery Circuit Court.

A. Thompson, H. H. Ristine, T. H. Ristine, B. F. Ristine, S. Claypool, J. L. Mitchell and W. H. Ketcham, for appellants.

M. D. White, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellees.

PERKINS, J.—The following complaint, in the form of a petition, was filed in the Montgomery Circuit Court:

“To the Hon. A. D. Thomas, Judge of said Court:

“Your petitioners, the plaintiffs in this case, would state, that, on the 2d day of April, 1868, they jointly purchased of one John Browning a certain tract of land in said county, to wit, the west half of the north-west quarter of section thirty-six, in town eighteen, range three west, excepting so much of said tract as is laid off in the original plat of the town of Valley City, as is platted from said tract, leaving in said tract 71 $\frac{20}{100}$ acres; also, 63 $\frac{44}{100}$ acres off of the east side of the east half of the north-east quarter of section 35, in township 18, north of range 3

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west. A copy of said deed is filed herewith, marked 'Exhibit A,' and made a part hereof, which said deed was duly recorded in deed record No. 31, on page 628, in the recorder's office of Montgomery county."

The granting part of the deed is as follows:

"Convey and warrant to William J. Inlow, Emarine Inlow and Elizabeth Sparks, for the sum of eighty-two hundred dollars," the real estate described in the deed.

The complaint proceeds:

"That, at the time of the purchase and conveyance of said land, said William J. Inlow and Emarine Inlow were, are now, and ever since have been, husband and wife, and have, ever since the purchase, held and occupied the land as joint tenants; that, in the year 18—, they all jointly laid off a portion of said tract into lots, as an addition to said town, which town is now known as New Ross, said lots, so laid off, being in Wm. J. Inlow's 1, 2, 3 and 4 addition to said town; that on the — day of ———, at the September term of the circuit court of said county, in the year 1874, said defendant Emma W. Hulett obtained a judgment against said Wm. J. Inlow and Henry Hulett, doing business under the name and style of Inlow & Hulett; that on the — day of ———, 1874, the clerk of said court issued an execution on said judgment to the sheriff of said county, commanding him to levy upon and execute the property of the said defendants in said cause; that on the — day of ———, 1874, the said Isaac M. Kelsey, sheriff of said county, levied on the undivided one-third part of the above lands, and is now advertising the same to be sold on the 30th day of January, 1875, and will sell the same on that day, unless he is restrained from so doing by the restraining order of this Hon. Court; that an emergency exists," etc.

A restraining order was granted.

At the ensuing term of the court, the defendants appeared and demurred to the complaint. The demurrer was overruled, and exception reserved. The defendants

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refused to answer, and thereupon a perpetual injunction upon the sale was granted, and an appeal taken to this court.

Most, if not all, of the questions arising in this cause have been expressly decided by this court.

In *Chandler v. Cheney*, 37 Ind. 391, these two propositions are decided:

1. "A husband and wife, though not thus described in a deed of conveyance of real estate executed to them, take under such deed as tenants by entireties."

2. "While such an estate exists, no interest in it can be sold on execution for the debts of the husband or wife, but the conveyance creating it may be set aside for fraud."

See 2 Cooley's Bl. Com. 182, note 6.

If a conveyance be made to husband and wife and a third person, it seems that the portion taken by the husband and wife will be held by them as tenants by entireties. *Chandler v. Cheney*, 37 Ind., on page 401; *Anderson v. Tannehill*, 42 Ind. 141. What that portion is, is immaterial in this case.

It is said in *Chandler v. Cheney*, *supra*, that estates by entireties are generally spoken of as joint tenancies, "but this is not strictly accurate." The draftsman of the complaint in this case was guilty of the same inaccuracy, but that does not change the legal effect of the conveyance, nor the rights of the parties.

See, on this subject, *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Fisher v. Provin*, 25 Mich. 347; *Hemingway v. Scales*, 42 Miss. 1.

The judgment below is affirmed, with costs.

Leary v. Ebert *et al.*

LEARY v. EBERT ET AL.

VENUE, CHANGE OF.—*Change from Judge, and also from County, may be Taken.*—A party to an action is not precluded from taking a change from the judge before whom the cause is pending by the fact that he has already obtained a change of venue from the county.

From the Hendricks Circuit Court.

C. P. Jacobs and E. H. Terrell, for appellant.

E. H. Lamme, for appellees.

WORDEN, J.—This was an action by the appellees, against the appellant, to foreclose a mechanic's lien.

The action was brought in the Marion Superior Court, and the cause was sent by change of venue, on the application of the appellant, to the Hendricks Circuit Court for trial.

In the latter court, the appellant, in a proper affidavit, moved for a change from the judge, owing to alleged bias and prejudice of the judge of that court against him, but his motion was overruled, and he excepted.

Such further proceedings were had, as that judgment was rendered for the plaintiff.

Error is assigned upon the overruling of the motion for a change from the judge, and this is the only error which we need to consider in the cause.

We suppose the motion was overruled, because the appellant had already taken a change of venue from the county in which the action was brought.

The statute provides for a change of venue from the county in the following cases:

Where the opposite party has an undue influence over the citizens of the county, or an odium attaches to the applicant or to his cause of action or defence, on account of local prejudice; or,

Where the county is a party to the suit; or,

Where it is shown to the court that the convenience

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of witnesses and the ends of justice will be promoted by the change.

In such cases, the cause is to be sent to some other county for trial.

The statute also provides for a change of venue in the following cases, though the term "change of venue" is somewhat inaptly applied to them, inasmuch as there is to be no change of the venue at all:

Where the judge has been engaged as counsel in the cause prior to his election or appointment as judge, or is otherwise interested in the cause; or,

Where the judge is of kin to either party; or,

Where the judge of the court, wherein such action is pending, is a material witness for the party applying for such change; or,

When either party shall make and file an affidavit of the bias, prejudice or interest of the judge, before whom the said cause is pending, the said court shall grant a change of venue.

In the latter class of cases, the cause is not sent from the county to be tried, but another judge or lawyer is to be called to try the cause. 2 R. S. 1876, p. 116, secs. 207 and 208, and act of 1875, p. 120. See, also, later statute, Acts 1877, Reg. Sess., p. 28.

The statute, last clause of section 208, above cited, provides, that "Only one change of venue shall be granted to the same party."

Looking only to the letter of the statute, it would seem that one change only could be granted to the same party, inasmuch as the Legislature has characterized the change, in each class of cases, as a change of venue. But we are not inclined to adopt this strict construction of the statute. In looking at the spirit and purpose of the statute, we are satisfied, that the Legislature did not intend such results as would follow from such construction. The purpose of the statute was, to secure to litigants the benefit of an impartial jury for the trial of their

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causes; hence the provisions for a change of venue from the county. It was also the intention of the statute to secure to litigants a disinterested and impartial judge, before whom their causes are to be tried; hence the provisions for a change of judges. We are satisfied, that the Legislature did not intend, because a party has taken a change of venue from the county, that he should be compelled to try his cause before an interested, biased or prejudiced judge.

We are of opinion, that the provision restricting the number of changes by a party was intended to prevent him from taking more than one change from the county, or more than one from the judge, but not to prevent him from taking one from the county and one from the judge. In other words, the provision was intended to restrict a party to one change of the same class.

We are of opinion, therefore, that the court erred in overruling the appellant's application for a change of judges. The case of *Collins v. Frost*, 54 Ind. 242, is not, on its face, in conflict with this opinion; for, in that case, it does not appear that one application was for a change from the county and the other from the judge.

The judgment below is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

BRAY v. BLACK.

NEW TRIAL.—*Cause.*—*Motion to Dismiss.*—The ruling of the court on a motion to dismiss an action is not ground for a new trial.

PROMISSORY NOTE.—*Action by Devisee.*—*Parties.*—*Decedents' Estates.*—*Waiver.*

—In an action upon an unendorsed promissory note, by a plaintiff alleging himself to be the owner thereof by devise from the payee, the representative of the latter should be made a party defendant, or the

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57	417
180	116
180	117

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complaint should allege that there is no such representative; but a failure to object to such defect is a waiver thereof.

SAME.—*Defect of Parties.—How Presented.*—Such objection is not presented by a motion to dismiss the action on the ground of the insufficiency of the complaint.

SAME.—*Capacity to Sue.—How Questioned.*—An objection in such case that the plaintiff has not legal capacity to sue, on the alleged ground that letters of administration of the deceased payee's estate have not been granted to the plaintiff, is insufficient.

From the Hendricks Circuit Court.

C. C. Nave and *C. A. Nave*, for appellant.

L. M. Campbell, for appellee.

BIDDLE, C. J.—Suit brought before a justice of the peace by Virginia T. Black, on a joint promissory note made by Richard H. Bray and Francis M. Bray, payable to the order of John Black. The note was not endorsed.

To show title to the note and her right to sue upon it, Virginia T. Black avers, in her complaint, the death of the payee of the note, and "that she is the sole and lawful owner of said note by devise of said John Black, deceased."

At the trial, the justice found in favor of the defendant Richard H. Bray, upon the ground that he was a minor, and against Francis M. Bray, in favor of the appellee, for the amount due on the note, and rendered judgment accordingly.

Francis M. Bray appealed to the circuit court, and therein moved to dismiss the case for the following reasons, viz.:

"1. Because the cause of action does not state facts sufficient to constitute a cause of action; and,

"2. That the plaintiff Virginia T. Black has not legal capacity to sue, in this: It appears by the cause of action that John Black, the payee of the promissory note sued on, is dead, and it is not shown that letters of administration have been issued or granted to the said Virginia T. Black, the plaintiff in this suit, upon his estate, or to any

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one else, as required by the statute in such case made and provided."

The motion to dismiss was overruled, and an exception to the ruling reserved.

Trial by the court; finding against Francis M. Bray; motion for a new trial; overruled; exception; judgment; appeal.

The causes assigned for a new trial were:

1. That the decision of the court is contrary to law; and,

2. That the court erred in overruling the written motion of the defendant to dismiss said cause.

The evidence is not before us. There is nothing to show us any error of law occurring at the trial. This disposes of the first cause assigned for a new trial.

The second cause assigned is not an error occurring at the trial. If an error at all, it occurred before the trial. It is therefore manifest that granting a new trial would not reach it. The overruling of the motion for a new trial presents no question.

Did the court err in overruling the motion to dismiss the cause for the reasons assigned? This is the sole question now before us.

The only ground of insufficiency in the cause of action that we can find is a defect of parties defendants. Undoubtedly, the representatives of the deceased payee should have been made parties defendants, to answer as to their interest in the note, or the cause of action should have contained an averment that there were no such representatives. *St. John v. Hardwick*, 11 Ind. 251. But this defect was not assigned as a ground of dismissal. It must therefore be held as waived.

The first cause assigned as a ground of dismissal does not reach a defect of parties defendants. *Strong v. Downing*, 34 Ind. 300; *Shane v. Lowry*, 48 Ind. 205; *Shirts v. Irons*, 54 Ind. 13.

The second cause assigned for dismissing the case pre-

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sents no ground whatever. Because the appellee had not obtained letters of administration on the estate of John Black, it does not follow that she had no legal capacity to sue. The want of such capacity must arise from some legal disability of the plaintiff, as infancy, idiocy, or coverture. *Debolt v. Carter*, 31 Ind. 855.

There is no available error in the record.

The judgment is affirmed, with costs and five per cent. damages.

ROBERTSON v. CAUBLE ET AL., ADM'RS.

MORTGAGE.—Foreclosure.—Promissory Note.—Mortgage by Assignor to Assignee.
—*Endorser.*—The payee of certain promissory notes, having assigned the same to another by a blank endorsement, executed to the assignee, to secure the payment of such notes, a mortgage on certain real estate, conditioned that if the payee "shall pay said notes according to their tenor and effect, or cause the same to be paid, this mortgage shall be void," etc.

Held, in an action upon such note, and to foreclose such mortgage, by the assignee, against the maker and payee, that the plaintiff is entitled to personal judgment against both defendants for the amount due on such note, to foreclosure of such mortgage against the payee, and to execution over against the maker for any part of such judgment remaining unsatisfied by the sale of the mortgaged premises.

Held, also, that the liability of such payee is primary, and not merely that of an endorser.

From the Washington Circuit Court.

T. L. Collins and *A. B. Collins*, for appellant.

S. B. Voyles and *T. Huston*, for appellees.

NIBLACK, J.—This was an action by Peter C. Cauble and Sarah E. Caspar, as administrators of the estate of Lewis Caspar, deceased, against the appellant, Henry Robertson, John Huffman and William H. Huffman, on seven promissory notes, and to foreclose a mortgage exe-

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cuted by the said Robertson to secure the payment of said notes.

Robertson filed a separate demurrer to the complaint, which was overruled.

Robertson then answered in general denial. The Huffmans made default.

There was a trial by the court, a finding and judgment against all the defendants, and a decree of foreclosure against Robertson on the mortgage, with an order for execution against the Huffmans for any balance that might remain due after exhausting the mortgaged property.

The complaint shows that five of the notes sued on were executed by the said John Huffman on the 31st day of August, 1867. The other two notes were executed at the same time by him and the said William H. Huffman jointly. These notes fell due at different times, and were all made payable to the said Robertson.

Afterward, on the 24th day of August, 1868, Robertson sold these notes to the said Lewis Caspar, and assigned the same to him, said Caspar, by the indorsement of his, said Robertson's, name in blank upon each one of them. To secure the payment of the notes, Robertson, on the same day, executed to Caspar a mortgage on certain real estate. The object and condition of the mortgage were declared to be, "To secure said Lewis Caspar in the payment of the sum of three thousand and seven dollars and eighteen cents, evidenced by nine promissory notes, as follows, to wit:—" (Here follows a description in detail of the promissory notes above referred to, with a reference to the indorsements thereon.) "Now, therefore, if said Henry Robertson shall pay said notes according to their tenor and effect, or cause the same to be paid, this mortgage shall be void and of no effect."

The appellant assumes, in his argument here, that he is only liable on the above named notes as an indorser, and that the mortgage does not, in any manner, extend his liability upon them; that the complaint, as against

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him, was defective in not showing that proper proceedings had been first taken against the Huffmans to charge him as such indorser, and that, hence, the court erred in overruling his demurrer to the complaint.

Even if Robertson had not in any way been a party to the notes, it was competent for him to assume their payment, or to make himself liable upon them as a maker, by the execution of a mortgage or other separate instrument in writing. *Josselyn v. Edwards*, ante, p. 212. Being already an indorser of the notes, it was equally competent for him to increase or extend his liability upon them, if he chose to do so.

We think the phraseology of the mortgage, above quoted, extends his liability on the notes beyond that of an indorser or guarantor merely, and makes him primarily liable for their payment, at least to the extent to which they were secured by the mortgage.

In that view, we seem to be fully sustained by the case of *Zekind v. Newkirk*, 12 Ind. 544. See, also, *Burnham v. Gallentine*, 11 Ind. 295, and *Watson v. Beabout*, 18 Ind. 281.

We can not, therefore, hold, that the court erred in overruling the appellant's demurrer to the complaint.

The appellant also complains, that certain portions of the judgment are not in accordance with the finding of the court, and are therefore erroneous. But, as no exception seems to have been reserved to the action of the court in the rendition of the judgment, we can not consider the supposed errors, thus complained of.

We are unable to discover any available error in the record.

The judgment is affirmed, at the costs of the appellant.

Leever v. Hamill.

LEEVEVER v. HAMILL.

SUPREME COURT.—Practice.—Failure to Object to Evidence.—Error in the admission of evidence which was neither objected to nor assigned as cause for a new trial is not available on appeal to the Supreme Court.

MALICIOUS PROSECUTION.—Evidence.—Parol Evidence of Record.—On the trial of an action to recover damages for an alleged malicious prosecution of the plaintiff by the defendant, it was established by parol evidence, without objection by the defendant, that he had caused the plaintiff to be arrested for a crime, and that, owing to the failure of the defendant to appear as a witness against the plaintiff, the cause had been continued from time to time, till the plaintiff was finally allowed to go at liberty. *Held*, that the evidence sufficiently shows an end of such prosecution.

From the Marion Superior Court.

H. Dailey, W. N. Pickerill, J. Hanna and F. Knefler, for appellant.

J. S. Harvey, for appellee.

BIDDLE, C. J.—Complaint by Michael Hamill, against Philip A. Leever, for malicious prosecution and false imprisonment.

An answer was filed, various rulings upon demurrers had, and exception taken; but, as the appellant has waived the discussion of these questions in his brief, we shall waive their statement and examination.

Issues of fact were joined, a trial by jury had, and a verdict for appellee found.

A motion for a new trial was made, founded on the following causes:

1. The verdict is contrary to law;
 2. The verdict is not sustained by evidence;
 3. The damages are excessive; and,
 4. The verdict is not sustained by sufficient evidence.
- Motion overruled; exception; appeal.

We may dispose of the first assignment of error by saying, that no question of law occurring at the trial has been raised. The appellant discusses, in his brief, the admission of certain evidence to the jury, which he insists

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was incompetent; but he neither objected to it at the time it was offered, nor assigned its admission as a cause for a new trial. There is therefore no such question before us.

The second and fourth assignments of error are the same. The only questions properly before us are: Does the evidence sustain the verdict? Are the damages excessive?

The evidence is too voluminous to copy, and too diffuse to condense and present it fairly; but we have carefully read it all, and believe it fairly sustains the verdict. Nor can we say that it does not fairly support the amount of damages assessed.

But the appellant insists that the evidence does not show a final determination of the prosecution complained of, and a discharge of the appellee therefrom. It is true, that no record evidence was shown of a final discharge of the appellee; but his arrest for larceny and imprisonment, at the instance of the appellant, are shown, and that the appellee appeared before the mayor in obedience to the writ; that, no prosecuting witness appearing, the case was continued; that he appeared again, according to the continuance; that still no witness appeared against him, and no trial was had, but that he was allowed to go at liberty; all of which was shown by parol evidence, without objection, and which stands uncontradicted.

We think this is sufficient to authorize the jury to find that the prosecution was at an end. At least, we can not disturb the verdict on this ground, after it has been examined by, and received the sanction of, the court below.

The judgment is affirmed, with costs.

Stokesberry *et al.* v. Reynolds.

STOKESBERRY ET AL. v. REYNOLDS.

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ADEMPITION.—*Descents.*—The doctrine of ademption is not applicable to property taken by descent.

SAME.—*Advancements.*—*Partition.*—Where a father, during his lifetime, gives to a son a sum of money, pursuant to a verbal agreement between them that it shall be in full of the interest of the latter in the estate of the former at his death, such sum, in an action by such son or his grantees to partition the real estate of which the father died seized, shall be treated simply as an advancement.

SAME.—*Presumption.*—Where, in an action for partition of real estate among heirs, the contrary does not appear, it will be presumed that the ancestor died intestate.

From the Morgan Circuit Court.

S. Claypool and *W. H. Ketcham*, for appellants.

W. R. Harrison and *W. S. Shirley*, for appellee.

BIDDLE, C. J.—Petition by Henry Reynolds, against James M. Stokesberry and others, for the partition of certain lands.

The court, at the request of the appellants, made the following finding:

“That John Stokesberry, Senior, died seized of the lands in question in the year 1839, leaving John Stokesberry, Junior, his son, and six other sons and daughters, his heirs at law; and, in the Summer of 1858, the plaintiff obtained from the said John Stokesberry, Junior, a conveyance by quitclaim deed of his interest in the said land in question.

“The court further finds, that about two years before the death of John, Senior, he made an arrangement with said John, Junior, and another son, to the effect that if John, Senior, would give them, the said John, Junior, and his brother, one hundred dollars each, the said John, Junior, and his brother would receive and take the same as an endowment in full for all their interest in their father’s estate after their father’s death; and, pursuant to this agreement, the father sold another tract of land which

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he then owned, for the purpose of raising said two hundred dollars, and thus raised the said sum and paid the same to John, Junior, and his brother, under and pursuant to said agreement.

“And the court further finds, that the said two hundred dollars was more than equal to the value of two-sevenths part of all the estate of John, Senior, at the time of his death, but that the said two hundred dollars is not equal to two-sevenths of said estate, estimating the said land at its present value, or at its value at the commencement of this suit, or at the time of the plaintiff’s purchase from John, Junior.

“The court further finds, that, on the day the aforesaid agreement was made, it was also agreed by and between the father and the defendant, that the defendant was to live with his father on the land in question and take care of his father and mother and invalid brother during the lives of each of them, and in consideration of such services he was to have and own the land in controversy. Said agreement, last mentioned, was never reduced to writing, but on the day of his father’s death it was agreed to be reduced to writing, but, having deferred it from the forenoon to the afternoon of that day, the father suddenly died in a fit, and said writing was never made. The said defendant, from the time of the payment of the said two hundred dollars as above, remained in possession of said land until the present time, and is now in possession; and said defendant kept and took care of said invalid brother and said father and mother, until they each died; the last of them, the mother, died in 1861. The defendant has made costly and valuable improvements on said lands, and since 1861 put up a good frame house, and cleared and fenced thirty acres of land.

“And the plaintiff bought John, Junior’s, interest in the land in 1858, and during the year 1859 he notified defendant thereof, and some negotiations took place between plaintiff and defendant in relation to plaintiff’s purchas-

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ing defendant's interest. This was before the death of the mother of defendant, and before he had built the new house or made much improvement on the land. The defendant bought the interest and took deed from the other brother, who had been advanced in the same manner as John, Junior. At one time, and before John, Junior, had sold and conveyed his interest to plaintiff, defendant had agreed with John, Junior, to buy his interest, and to pay a horse for the same; that, after his father's death, and up to the time of plaintiff's purchase of John, Junior's, interest, defendant frequently declared he would buy out the other heirs' interest in the land in question, and did buy and take deeds for the interest of all the heirs but John, Junior."

The court stated the conclusions of law upon the above facts, as follows:

"The court finds the sum, to wit, one hundred dollars paid by the father of the plaintiff's grantor, John, Junior, was, and is to be treated as, an advancement out of the estate of the father.

"That plaintiff, by virtue of John, Junior's, conveyance to him, is entitled to one-seventh part of the lands set out in complaint, less and subject to said advancement of one hundred dollars."

The appellants excepted to the above finding and ruling.

Upon what ground the counsel for appellants expect us to reverse this judgment. we are not informed. In their brief they simply state the findings, the conclusions of law, and their exceptions, and pray us to reverse the judgment.

By the brief on behalf of the appellee, it appears that it was insisted in the court below, on behalf of the appellants, that the interest of the vendor of the appellee in his father's estate was adeemed by his accepting the one hundred dollars, as stated in the finding.

We are of a different opinion. The doctrine of ademption

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is inapplicable to property taken by descent; it can be applied only to property taken by devise. The meaning of the word—to take away or extinguish—plainly shows its proper application. The advancement to two of his sons of one hundred dollars each, by the ancestor, did not take away or extinguish any thing which belonged to them by devise, or would have belonged to them by devise at his death. Besides, the doctrine of ademption is wholly inconsistent with the doctrine of advancements under our law of descents.

The finding does not state whether the elder Stokesberry died testate or intestate; and as it does not state that he died testate, we must presume that he died intestate. So the case was treated below, and so we must treat it here.

The court was correct in holding the one hundred dollars received by the appellee's vendor from his ancestor as an advancement, and the conclusions of law were properly applied to the facts stated in the finding. *Weston v. Johnson*, 48 Ind. 1.

The judgment is affirmed, with costs

STRONG V. THE STATE, EX REL. THE ATTORNEY GENERAL.

JUDGMENT.—*Form of in Criminal Cause.*—A judgment against the defendant in a criminal prosecution, that "It is considered by the court that the defendant do make his fine to the State of Indiana in the sum of," etc., pay costs, and stand committed, etc., is sufficient.

SAME.—*Action to Revive.*—*Statute of Limitations.*—The statute of limitations of twenty years is a sufficient defence to an action by the State, on the relation of the Attorney General, to revive, and obtain execution on, a judgment rendered against the defendant in a criminal prosecution.

SAME.—*Payment on Debt.*—*Reply.*—Where, in such case, a payment has been made on such judgment within twenty years, that fact should be replied.

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SAME.—Payment of Costs.—A payment of the costs accrued in such cause is not such a payment upon the judgment as will relieve it from the operation of the statute.

SAME.—Part Payment.—Presumption.—A partial payment of a debt, replied to the statute of limitations, raises only a *prima facie* presumption, that such payment is an admission of continued indebtedness.

From the Whitley Circuit Court.

J. S. Collins and *J. W. Adair*, for appellant.

C. B. Tulley and *C. A. Buskirk*, Attorney General, for the State.

BIDDLE, C. J.—Complaint to revive a judgment, and for execution.

It is shown in the complaint, that the State of Indiana, on the 6th day of April, 1854, recovered a judgment, in the court of common pleas of Whitley county, against the appellant, by way of a fine, for the sum of twenty dollars, and costs of suit taxed at six dollars and forty-eight cents; that the defendant, on the 17th day of November, 1855, paid the six dollars and forty-eight cents in and for the costs of said suit; that the judgment is unpaid, etc. Prayer, etc.

The present action was commenced on the 27th day of August, 1875.

A demurrer to this complaint, alleging as ground the insufficiency of the facts stated, was overruled, and exceptions reserved by the appellant.

The appellant then pleaded:

First. General denial;

Second. That the action did not accrue within twenty years; and,

Third. The same as the second, except that it sets out the dates of the judgment, of the payment of the costs, and of the commencement of this suit.

Demurrers to the second and third paragraphs of answer, upon the ground that they did not state facts sufficient to constitute a defence, were sustained, and exceptions reserved by the appellant.

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Trial by the court, on the issue of general denial; finding for the appellee, and, over a motion for a new trial and exception, a judgment of revivor and for execution; appeal.

The questions thus raised are assigned as errors.

The appellant insists, that the complaint does not show that a sufficient judgment was rendered against him, in favor of the State, either for the fine or costs. The language of the judgment is as follows:

"It is therefore considered by the court, that the said defendant, Ephraim Strong, do make his fine to the State of Indiana in the sum of twenty dollars, pay the costs of this proceeding, and stand committed," etc.

We think this is a sufficient judgment for the fine and costs. It is in the usual form in rendering judgment for fines and costs.

But, in our opinion, the court erred in sustaining demurrers to the second and third paragraphs of answer. Either of them is good. If the facts are true as alleged, they constitute a good bar to the action. If the appellee wanted the benefit of the partial payment of the debt, the facts should have been replied. An admission of continued indebtedness may be inferred from the fact of part payment, but the court is not allowed to imply such admission as an inference of law. It must be left as a fact to the jury or court trying the cause. It is only *prima facie*, and may be rebutted by evidence. Besides, to take the case out of the statute by a part payment, it must appear that the payment was made on the debt for which the action was brought. We do not think, that the payment of the costs, as alleged in the complaint, was a payment on the debt due to the State. The costs might have been due to other parties, and wholly independent of the judgment in favor of the State. A payment of the costs could not be construed to mean an acknowledgment of the continuance of any debt except the costs.

These principles are fully sustained by the following cases

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in our own reports, and by many others from other States cited therein: *Carlisle v. Morris*, 8 Ind. 421; *Elliott v. Mills*, 10 Ind. 368; *Prenatt v. Runyon*, 12 Ind. 174; *King v. Manville*, 29 Ind. 134; *Kisler v. Sanders*, 40 Ind. 78; *Ferguson v. Ramsey*, 41 Ind. 511; *Ketcham v. Hill*, 42 Ind. 64.

The judgment is reversed, with costs, and cause remanded, with instructions to overrule the demurrers to the second and third paragraphs of appellant's answer, and for further proceedings.

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LIQUOR LAW.—Application for License.—Juror.—Competency of.—Challenge.—

Where, on appeal to the circuit court of an application for license to sell intoxicating liquors, a juror, on being examined as to his competency to serve, answers, that he is "opposed to granting license to any person, under any circumstances," a challenge to him for cause should be sustained.

SAME.—Immorality or Unfitness of Applicant.—Unlawful Sale.—Instruction to Jury.—The fact as to whether or not an unlawful sale of intoxicating liquor, made by the applicant, is such an immorality or unfitness on his part as should defeat his application, is a question for the jury alone, the decision of which should not be influenced by an affirmative instruction of the court.

SAME.—Sale Without License.—May be Lawful.—A sale of intoxicating liquor in a less quantity than a quart, without license, is not necessarily an unlawful act.

From the Henry Circuit Court.

D. W. Chambers and *E. Saint*, for appellant.

W. Grose, *M. E. Forkner* and *E. H. Bundy*, for appellees.

BIDDLE, C. J.—Application by the appellant, under section 8 of the act of March 17th, 1875, (1 R. S. 1876, p. 869,) to obtain license to sell intoxicating liquors.

57	431
135	70
57	431
139	126
139	213
57	431
145	463

A remonstrance was filed against the application. The case was heard before the board of county commissioners, and the license denied.

The applicant appealed to the circuit court, wherein the case was tried by a jury, and the license again denied. Appeal to this court.

Several questions are presented for our decision.

In empanelling the jury, Jesse Swain was called as a juror, to whom the appellant propounded the following questions touching his competency to serve:

"Have you formed or expressed an opinion as to the merits of this case?"

To which the juror answered:

"No; but I am opposed to granting license to any person, under any circumstances."

The appellant then asked the juror the following question:

"Are your prejudices such that you would not be willing to render a verdict granting license, although the testimony should authorize it under the law?"

To this question the appellees objected, without pointing out any grounds of objection. The court sustained the objection, and the appellant excepted.

The appellant then asked the juror the following question:

"Are you willing to execute the law, as a juror, authorizing the granting of license to retail intoxicating liquor?"

An objection was made by the appellees to this question also, but no grounds of objection were pointed out. The court sustained the objection, and the appellant excepted.

Another similar question was propounded to the juror by the appellant, an objection made to it by the appellees, without alleging any ground of objection, the objection sustained by the court, and exceptions reserved by the appellant.

Upon this evidence, the appellant challenged the juror

for cause, but the court denied the challenge, and the appellant excepted.

We think the challenge for cause should have been allowed. The answer of the juror, that he was "opposed to granting license to any person, under any circumstances," was equivalent to saying, that he was opposed to granting license to the appellant, if he established his right to obtain license according to law. That a juror, entertaining such an opinion, was incompetent to sit in the case, is a proposition which seems so plain to us that we think reasons given in its support would be thrown away. The independence, freedom from interest, impartiality, and the unbiased opinion of jurors must be secured to all, or justice can not be administered.

At the close of the evidence, the court, of its own motion, instructed the jury as follows:

"If you find from the evidence given in the cause, that the applicant, John W. Keiser, was guilty of selling intoxicating liquor in violation of law, before the making of his application for license in this case, and has, since the making of such application, sold intoxicating liquor in violation of the law, such selling would be an immorality and unfitness of the applicant to be entrusted with license, and you should find against him."

To the giving of this instruction, the appellant reserved his exceptions properly.

We think this instruction is erroneous. It plainly tells the jury what evidence was sufficient to defeat the application. The immorality of the act mentioned in the instruction, and the fitness or unfitness of the applicant to obtain license, were questions of fact for the jury to decide from the evidence before them, and with which the court had no right to interfere.

The court, also upon its own motion, further instructed the jury, as follows:

"If he sold intoxicating liquor to Scott Toby or Levi

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Bond, in a less quantity than a quart at a time, he having no license from the board of commissioners of Henry county to sell in less quantities than a quart at a time, or if he sold the same to be drunk, or suffered it to be drunk, in his house, out-house, yard, garden, or the appurtenances thereto belonging, such selling would be in violation of law, and would [be] an immorality and unfitness of the applicant to be entrusted with license."

To the giving of this instruction the appellant reserved his exceptions.

This instruction is erroneous, for the same reasons which rendered the one just noticed erroneous, and for the further reason, that the sale of intoxicating liquor, without license, by a less quantity than a quart at a time, is not necessarily unlawful. There are exceptions to the rule. If we were to hold, that the instruction expresses the law, it would make the sale of medicine containing intoxicating liquor in a less quantity than a quart, though prescribed by a physician and necessary for the patient, an immoral act. It can not be properly stated, as a legal proposition, that the sale of intoxicating liquor is an immoral act. Surely, the learned judge, who gave the instruction, never intended to state to the jury what the language of the instructions plainly means.

The judgment is reversed, with costs, and cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

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57	435
148	452

MORTGAGE.—Indemnity for Future Endorsements.—Subsequent Encumbrance.—

Notice.—Where the owner of real estate, in consideration of the agreement of another to become an endorser, to a specified amount, of negotiable paper of the former, executes to the latter a mortgage on such real estate, to indemnify him against loss, not only from such future endorsements, but also from similar endorsements already made, such future endorsements, when made, relate back to the execution of such mortgage, and are valid liens against encumbrances placed upon the mortgaged property subsequent to the execution of such mortgage, by persons having either actual or constructive notice thereof, though such endorsements be made by the mortgagee subsequent to the placing of such encumbrances, and with notice thereof.

PRACTICE.—Motion to Strike Out.—A motion to strike out part of a pleading should specify some reason therefor.

SAME.—Supreme Court.—The overruling of a motion to strike out part of a pleading is not available as error on appeal to the Supreme Court

From the Vanderburgh Circuit Court.

C. Denby, S. R. Hornbrook and D. B. Kumler, for appellant.

A. Iglehart, J. E. Iglehart and P. Maier, for appellees.

Howk, J.—Before and on the 19th day of October, 1874, two actions were pending in the court below, severally entitled as follows:

1. *Frederick W. Brinkmeyer v. Anton Helbling et al.;* and,

2. *Thomas and James M. Scantlin v. Anton Helbling and others.*

The plaintiff in the first of these two actions was a defendant in the second, and the plaintiffs in the second were defendants in the first.

Each of said actions was brought to foreclose a certain mortgage, executed to the plaintiff or plaintiffs in the particular action; and the mortgages sued upon in the two actions covered the same property. Other parties, having or claiming to have an adverse interest in the mortgaged property, or some part thereof, were also made

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parties to said actions. Issues had been made up in both said actions, and afterward, on said 19th day of October, 1874, the said two actions, by consent of all parties, were consolidated, and were thus submitted to the court below for final trial.

Upon this trial the court made a finding, which will be hereafter noticed, and, over the appellant's written motion for a new trial, and his exception saved to the decision of the court thereon, the judgment, from which this appeal is now prosecuted, was rendered upon the finding.

As the issues joined in these two actions present substantially the same questions, and as the alleged errors assigned by the appellant, which call in question the decisions of the court below in relation to the pleadings of the parties, have been assigned with special reference to the first of said actions, in our consideration of the questions presented by those errors, our examination of the pleadings will be chiefly directed to those in the first action, in which the appellant was the plaintiff in the court below.

In his complaint, the appellant alleged, in substance, that on the 29th of December, 1868, the appellees Anton Helbling and his wife, Emanuel K. Grayville, and Frederick Browneller and his wife executed a mortgage conveying to the appellant the real estate therein described, to secure, save harmless and indemnify the appellant against all loss or damage, as the endorser and surety on notes, bills and acceptances of the said Anton Helbling, and all renewals of the same to banks or individuals, to an amount not to exceed four thousand dollars; and the said mortgage further provided, that the appellant might institute legal proceedings to foreclose the same, to indemnify and save himself harmless as endorser and surety on the notes, bills and acceptances of either the said A. Helbling & Co., which firm was composed of the male mortgagors, or of the said Anton Helbling, or of both, which the appellant had then, or might thereafter, become liable for; that is to say, in case any of the said notes,

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bills or acceptances on which the appellant, at the time of the execution of said mortgage, was liable, or might thereafter become liable, were not paid or renewed at maturity, then the right to foreclose said mortgage should immediately accrue to the appellant. And the appellant said, that in consideration of the delivery to him of said mortgage, and for no other consideration, he endorsed and became the surety for said Helbling on notes and bills, in the sum of four thousand dollars, the whole of which said sum (except about four hundred dollars then outstanding, as per bill of particulars filed with said complaint) the appellant had been compelled to and did pay, as the surety of said Anton Helbling, whereby an action had accrued to him upon said mortgage for said sum of four thousand dollars; that, at the instance and request of the male mortgagors, he had released certain parts, describing them, of the mortgaged premises from the operation of said mortgage on the 31st day of May, 1869, and again on the 1st day of November, 1869; that, after the execution of said mortgage, the other appellees had, or claimed to have, acquired some interest in, or lien upon, the said mortgaged premises, or some part thereof, junior to said mortgage; and that, by reason of the premises, the appellee Anton Helbling was indebted to the appellant in the sum of four thousand dollars, and in the further sum of five hundred dollars for attorney fees, etc., which remained due and unpaid. Wherefore, etc.

A copy of said mortgage was filed with, and made part of, appellant's complaint. We set out so much of the conditions of said mortgage as seems to be material in this action, as follows:

"And the said Anton Helbling desires the said party of the second part to endorse and become liable upon his paper, notes, bills and acceptances to banks and individuals, for an amount not to exceed \$4,000; and the said party of the second part having agreed to become endorser for the said A. Helbling & Co. and the said Anton Hel-

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bling, upon their paper, notes, bills and acceptances, for sums of money not to exceed the amount aforesaid, and whereas it may be necessary for the said party of the second part to become the endorser and surety of the aforesaid parties of the first part on the renewal of the paper, notes, bills and acceptances aforesaid: Now the object and purpose of this mortgage is to secure, save harmless and indemnify the said Brinkmeyer * * * * against all loss or damage as the endorser and surety upon notes, bills and acceptances of the said Anton Helbling and all renewals of the same to banks or individuals, to an amount not to exceed \$4,000."

As the main controversy in this appeal is between the appellant and the appellees Thomas Scantlin and James M. Scantlin, we think it necessary to a proper understanding of the questions at issue between the said parties that we should set out in full the answer and cross-complaint of the said appellees, as follows:

"Said defendants, Thomas Scantlin and James M. Scantlin, partners doing business under the name and style of Thomas Scantlin & Son, for answer to said complaint, and for a cross-complaint against said plaintiff, say, that they admit the making and delivering of said mortgage. But they say, that the claim of said plaintiff is junior to these defendants' claim, because, they say, that heretofore, to wit, on the 9th day of July, 1872, defendants Anton and Dorothea executed to these defendants a mortgage upon the same property described in the complaint, a copy of which is filed herewith as part of this answer, as exhibit 'A.'

"And these defendants say, that any claim of plaintiff under this mortgage ought to be postponed to the claim of these defendants, because, they say, that heretofore, to wit, in February, 1871, these defendants were engaged, in the city of Evansville, in the business of selling stoves, under the firm name of Scantlin & Son; and defendant Anton Helbling had erected a new foundry upon the six

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lots first mentioned in the complaint, of which he then was, and now is, the owner, with the agreement with the plaintiff, that they, the said Helbling and Brinkmeyer, who had been former partners in the foundry business, would go into the foundry business as partners for the manufacture of stoves, in said foundry. These defendants further aver, that defendant Anton, previous to said last mentioned date, had been, and was, possessed of small capital and limited means, and was owing debts of large amounts, and was financially embarrassed, while the plaintiff was then, and now is, a man of large means, who possessed great influence over said Anton and Dorothea in all business matters; and thereupon, at the date aforesaid, plaintiff refused to go into partnership with said Anton, but, at the request and on the advice of said plaintiff, said Anton sought a partnership with these defendants, who thereupon negotiated with the said Anton, with the view of entering into a partnership with the said Anton in the stove foundry business; and thereupon said plaintiff, pretending to be desirous of assisting said Anton, agreed with these defendants to cancel his mortgage upon said foundry lots, in order that said property might become partnership assets, free from incumbrances, and thereby any money investments made by these defendants in said foundry might be made secure to these defendants. And therefore these defendants became partners with the said Anton, under the firm name of Scantlin, Helbling & Co., and invested large means and money in said foundry, on the faith of said agreement of plaintiff so to cancel his mortgage. And these defendants say, that, on the 1st day of March, 1871, by written articles of partnership, they entered into partnership with said Helbling, as heretofore stated. A copy of said articles of partnership, marked exhibit 'B,' is herewith filed as a part hereof, and the contents of such articles were, at their date, known to plaintiff. And these defendants further aver, that, by the terms of said articles, said foun-

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dry and lots, of great value, were, and became, partnership assets in said firm, and said firm borrowed money for capital to carry on said business, which became profitable. But these defendants aver, that in said articles was, and is, a provision for the appraisement of said lots and their purchase by these defendants of said Anton; and, at the times provided in said articles, to wit, about the 1st day of February, 1872, all the preliminaries therein required for the purchase aforesaid were completed, and said lots duly appraised, and these defendants thereupon demanded a conveyance under said articles; and said Anton was thereupon willing to comply with the terms of his partnership agreement, but thereupon plaintiff persuaded said Dorothea, the wife of said Anton, to refuse to sign a deed to these defendants, and she thereupon did refuse to sign it for said half of said foundry lots; and, by such intermeddling of plaintiff, said members of said firm were unable to complete such purchase and sale. And these defendants say, that, said Helbling being then individually financially embarrassed, they were compelled, for their own safety in the matters of said firm, to settle the affairs of said firm as hereinafter stated, at a sacrifice to their rights and of money, caused by the inability of said Anton to comply with the terms of said partnership agreement, prevented as aforesaid by the intermeddling of plaintiff. And these defendants aver, that, immediately previous to the 1st of March, 1872, upon the demand of said defendants, and the consent of said Anton, for the carrying out of the purchase and sale of said half of said lots, said lots were, and became, partnership property as against the claim of said Brinkmeyer, and were subject to the payment of the partnership debts of Scantlin, Helbling & Co., in priority to the claim of plaintiff. To carry out the terms of said partnership agreement, their investments in said foundry, and liability for the debts of said foundry, which were a large sum, to wit, nine thousand dollars, rendered it necessary for them, for

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their own safety, to immediately dissolve said firm, with the consent of said Anton, to the great injury of its business, and to make a settlement of said firm's affairs, which was then made by them and defendant Anton, in the best manner possible, which final settlement was in writing, a copy of which, marked exhibit 'C,' is herewith filed as a part of this answer. And these defendants say, that said settlement agreement was afterward carried out, and a portion of the indebtedness of said firm, to wit, the sums of eighteen hundred dollars and two thousand dollars, with interest, was, in consideration of firm assets purchased by said Anton, assumed by said Anton in bank where the same were owing; and, said Anton being without credit, and being unable to give other security to the defendants, they, these defendants, having credit, were compelled to endorse for said Anton for said amounts, taking as their security, at the time, the mortgage heretofore set out. And these defendants say, that said endorsements were by them afterward renewed from time to time, and said renewals paid upon a note and bill, copies of which are filed herewith, marked exhibits 'D' and 'E.' These defendants further aver, as to the claim of plaintiff, that, on the 1st day of March, 1871, aforesaid, the claim of plaintiff, under his said mortgage, embraced no sums now due, but that, since that date, after the organization of said firm of Scantlin, Helbling & Co., with knowledge of the facts heretofore stated, plaintiff made endorsements for said Anton till the date and record of these defendants' mortgage, such endorsements and claims being then about twelve hundred dollars, as he avers; and after the date and record of these defendants' mortgage, with full notice of said mortgage and said endorsements by these defendants, plaintiff made a further endorsement under his mortgage for the further sum of two thousand dollars, as he avers. These defendants further aver, that the mortgage of plaintiff was made before the foundry building and fixtures, with engines,

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boilers, and machinery and tools, were placed on said lots, and such property was, by such mortgagors, specifically mortgaged to these defendants, being property of said firm of Scantlin, Helbling & Co., and in them said Brinkmeyer has no claim as against these defendants; wherefore these defendants say, that, inasmuch as said Brinkmeyer induced these defendants, by persuading said Anton and promising to cancel said mortgage, to form said partnership, and inasmuch as he intermeddled in the affairs of said firm, damaging its business, jeopardizing the rights of these defendants, and inasmuch as the rights of the defendants sought to be enforced in priority to plaintiff's claim accrued on the 1st day of March, 1871, prior to the existence of the pretended claim of said Brinkmeyer, the claim of the said Brinkmeyer ought to be postponed to the claim of these defendants. Wherefore these defendants ask judgment for five thousand dollars, the foreclosure of their mortgage, and the sale of the property described therein; that the proceeds of the sale of the boilers, engines, fans, cupola, fixtures and personal property aforesaid be applied on their claim in exclusion of all of plaintiff's claims, and that these defendants may have all other proper relief."

The mortgage, set out and sued upon in the foregoing answer and cross-complaint, was executed by the appellees Anton Helbling and Dorothea, his wife, to the appellees Thomas and James M. Scantlin, on the 9th day of July, 1872, or more than three and one-half years after the execution of the mortgage sued upon in appellant's complaint.

The appellant moved the court below, in writing, to strike out certain portions of the answer and cross-complaint of the appellees, the Scantlins, which motions were severally overruled, and proper exceptions were saved by the appellant to each of these decisions. And the appellant then replied by a general denial to the answer and cross-complaint of the Scantlins, and also, in like manner,

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to what is called the third paragraph of their answer. We think it unnecessary, however, for us to set out this third paragraph of the answer, as the questions at issue in this court between the appellant and the appellees, the Scantlins, fairly arise on their answer and cross-complaint.

In the second of the above entitled actions, in which the appellees, the Scantlins, were plaintiffs in the court below, the appellant filed a cross-complaint, which contained substantially the same averments as were contained in his complaint, in the first of said actions.

To this cross-complaint of the appellant, the appellee Peter Maier, one of the defendants thereto, answered in three paragraphs, as follows:

First. A general denial.

Second. By way of cross-complaint, said Peter Maier alleged, in substance, that, on the 19th day of January, 1871, one George Bauman recovered a judgment against the appellee Anton Helbling for eleven hundred and seventy-six dollars and seventy-two cents, and costs of suit, at the January term, 1871, of the Vanderburgh Common Pleas Court; that on the 18th day of April, 1871, said George Bauman recovered another judgment against said Anton Helbling for three hundred and two dollars and forty-two cents, and costs of suit, at the April term, 1871, of the court below, and that the appellant had full knowledge of the same; that on the 28th day of August, 1873, executions were duly issued on the said judgments to the sheriff of Vanderburgh county, and were, by said sheriff, levied on six certain lots, particularly described, in the city of Evansville, in said county; that, in pursuance of said levy, the said sheriff, on the 5th day of January, 1874, offered and sold the said six lots to Willard Carpenter, for the sum of four hundred and seventy-two dollars, for which the said sheriff executed a certificate of sale to said Carpenter, who assigned the same to the appellee Peter Maier, who then held a lien on said real estate for said four hundred and seventy-two dollars, by virtue of said

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certificate, with ten per cent. interest since said sale; and that his said lien was prior to the lien of his co-appellees and of the appellant. Wherefore said Peter Maier prayed, that his interests might be protected, and that his said claim might be declared a prior lien over the liens of the other parties to this action.

Third. By way of cross-complaint, the said Peter Maier alleged substantially the same facts he had alleged in his second paragraph, and, in addition thereto, he said, that his said lien had, and of right ought to have, priority over the lien of the appellant, because, he said, the appellant had full knowledge of the said several judgments, after the rendition thereof, and prior to the making of the said several advancements [endorsements?] in his cross-complaint mentioned, after the rendition of said judgments. Wherefore, etc.

The appellant demurred separately to the second and third paragraphs of said Peter Maier's answer, for the alleged insufficiency of the facts therein to constitute a defence to appellant's cross-complaint; which demurrers were severally overruled by the court below, and to these decisions the appellant excepted.

The appellee Willard Carpenter, by way of answer and cross-complaint to the complaint of the Scantlins and the appellant's said cross-complaint, alleged, in substance, that on the 27th day of September, 1872, he recovered a judgment against the appellee Anton Helbling, for six hundred and ninety-six dollars and twenty-three cents and costs of suit, at the September term, 1872, of the Vanderburgh Common Pleas Court; that execution was duly issued on said judgment, and by virtue thereof the sheriff levied on the same six lots, in the city of Evansville, described in Peter Maier's answer; that on the 28th day of June, 1873, the sheriff sold said real estate for the sum of six hundred dollars to said Willard Carpenter, and executed to him a certificate of purchase for said real estate; and that on the — day of ———, 1874, the said sheriff executed

to said Carpenter a conveyance of said real estate. And said Carpenter averred, that, by virtue of said judgment, sale and conveyance, he had a lien on said real estate prior to that of all the parties to this action, except that of the appellee Peter Maier. Wherefore, etc.

The appellant demurred to the answer and cross-complaint of said Willard Carpenter, for the want of sufficient facts therein to constitute a defence to appellant's cross-complaint, which demurrer was overruled, and appellant excepted.

Many other pleadings were filed, and other issues of law and fact arose thereon, in the progress of the two cases, before their consolidation; but we need not set them out in this opinion, as the errors assigned by the appellant in this court do not specially call them in question.

The two actions, having been put at issue, were consolidated and tried as one cause by the court below, and a finding made as before stated, of which finding we give a condensed statement as follows:

1st. Maier has priority over all parties upon the judgment and certificate set up in his answer, and has the oldest lien on lots 8, 9, 10, 11, 12 and 13, in Atkinson's Subdivision of Block 130, and the sum of \$508 is due him.

2d. Brinkmeyer has priority on lot No. 14, in Block No. 130.

3d. Said Thomas and James M. Scantlin have priority over Brinkmeyer on lots Nos. 8, 9, 10, 11, 12 and 13, in Block 130, except as to the sum of \$584.50, for which Brinkmeyer has a prior lien on said lots.

4th. That there is due Scantlins \$4,274.40, which is secured by mortgage on the last mentioned lots.

5th. There is due Brinkmeyer from Helbling \$4,191, secured by mortgage on the same lots.

7th. That the sum of \$1,200 of the sum found due Brinkmeyer is also secured by mortgage on another piece of property.

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8th. That W. Carpenter has a lien on lots 8, 9, etc., in Block 130, which is junior to the other liens.

The appellant's motion for a new trial having been overruled, and his exception saved to such ruling, as before stated, the court below rendered judgment in accordance with its finding, to which judgment the appellant also excepted.

In this court, the appellant has assigned the following alleged errors of the court below :

1st. In overruling the appellant's motion to strike out certain specified parts of the answer and cross-complaint of the appellees Thomas and James M. Scantlin ;

2d. In overruling the appellant's motion to strike out certain specified parts of the complaint of the appellees Thomas and James M. Scantlin ;

3d. In overruling the appellant's demurrer to the answer of the appellee Willard Carpenter ;

4th. In overruling the appellant's demurrer to the second paragraph of the answer of the appellee Peter Maier ;

5th. In overruling the appellant's demurrer to the third paragraph of said Peter Maier's answer ;

6th. In rendering judgment, that, out of the proceeds of the sale of lots 8, 9, 10, 11, 12 and 13, in Atkinson's Subdivision of Block 130, etc., the sum of five hundred and eight dollars should be first paid to said Peter Maier, before paying and satisfying the appellant's mortgage debt.

7th. In rendering judgment, that, out of the proceeds of the sale of said last described lots, the judgment in favor of said Thomas and James M. Scantlin should be paid before paying the appellant's judgment ;

8th. In overruling the appellant's motion for a new trial ;

9th. The answer and cross-complaint of the appellees Thomas and James M. Scantlin to the appellant's complaint did not state facts sufficient to constitute a defence or cause of action, as against the appellant ; and,

10th. In rendering judgments in favor of the said Scantlins and of the said Peter Maier severally, on the issues; whereas, on the issues joined, judgment should have been rendered in favor of the appellant.

Before considering the several questions presented by these alleged errors, it is proper for us to say, that the mortgage set out and sued upon in appellant's complaint is the same mortgage which was the subject-matter of the suit of *Brinkmeyer v. Browneller*, 55 Ind. 487.

In the case cited, it was held by this court, as applicable to said mortgage, that "Where the mortgagee has bound himself to make advances or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred, against subsequent purchasers or incumbrancers with notice, actual or constructive, of the mortgage." And it was further held, that "there was an ample and valid consideration" for the appellant's agreement to endorse for said Anton Helbling, "appearing on the face of the transaction;" and that, as against such purchasers or incumbrancers, with notice as aforesaid, the appellant had a lien on the mortgaged property, "by virtue of the mortgage, as an indemnity or security for whatever he may have paid, or for whatever he may be liable, on his endorsements for Helbling."

Keeping in mind this judicial construction of the mortgage sued upon by the appellant, we pass now to the consideration of the questions presented by the alleged errors of the court below, assigned by the appellant on the record of this action.

The first two of these alleged errors may properly be considered together, as in each of them the appellant has complained of certain decisions of the court below in overruling his motions to strike out certain specified parts of certain pleadings of the appellees, the Scantlins. There are several reasons why these two alleged errors, even

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if they in fact existed, would not be available to the appellant in this court.

In the first place, the appellant has failed to assign, in either of his motions to strike out, any cause or reason whatever why the same should be sustained. *Lucas v. Smith*, 54 Ind. 530. And besides, this court has often decided, that the decisions of the lower court, in overruling motions to strike out parts of pleadings, however erroneous they may be, will constitute no available error in this court. *Hutts v. Hutts*, 51 Ind. 581, and *House v. McKinney*, 54 Ind. 240.

The third alleged error of the court below, complained of by the appellant, was the overruling of his demurrer to the answer of the appellee Willard Carpenter. This answer, on its face, was intended to be both an answer to appellant's cross-complaint, and a cross-complaint of said Carpenter against the appellant and the other parties to this action. Whether it is considered as an answer, or as a cross-complaint, it is very certain, we think, that it did not state facts sufficient to constitute either a defence to appellant's action, or a cause of action against the appellant. It stated merely the naked fact, that the appellee Carpenter had obtained a sheriff's deed to a part of the property described in appellant's mortgage, under a judgment rendered against the mortgagor Anton Helbling, on the 27th day of September, 1872, nearly four years after the execution of said mortgage; and then it alleged, that, by virtue of said judgment, sale and deed, he, said Carpenter, had a lien on said property, prior to the lien of appellant's mortgage. How or why this was so, the answer failed to show by the proper averment of any fact or facts; and, therefore, we hold that the court below erred in overruling the appellant's demurrer to said Carpenter's answer or cross-complaint.

The fourth and fifth errors, assigned by appellant, call in question the decisions of the court below in overruling the appellant's demurrers to the second and third para-

graphs of the answer of the appellee Peter Maier to the appellant's cross-complaint. These two paragraphs contain substantially the same averments, and each of them, on its face, was both an answer and a cross-complaint. In our opinion, however, neither of these paragraphs stated facts sufficient to constitute either a defence to appellant's action, or a cause of action against the appellant. The facts stated by said Peter Maier, in each of the said paragraphs, were simply these: That, under two certain judgments, rendered against the mortgagor Anton Helbling, one on the 19th day of January, 1871, and the other on the 18th day of April, 1871, more than two years after the execution of said mortgage to the appellant, and executions issued on said judgments, a part of the mortgaged property had been sold by the sheriff, and a certificate of said sale executed by him, of which certificate the appellee Peter Maier was then the owner and holder; and that the appellant had full knowledge of said judgments, after the rendition thereof and before he made the said several advancements, in his cross-complaint mentioned.

Under our construction of the appellant's mortgage, in the case of *Brinkmeyer v. Browneller, supra*, and we still adhere to that construction, the appellant was bound, and could be compelled, to endorse for, or become the surety of, the appellee Anton Helbling, "for an amount not to exceed four thousand dollars." The fact that judgments had been rendered against said Anton Helbling would not absolve the appellant from this obligation; and, therefore, his knowledge of such fact, before he made advancements to, or incurred liabilities for, said Anton Helbling, could not, and would not, under the law, affect his rights under his mortgage. In such a case as this, the law is well settled, that the appellant had the right to hold his mortgage as a "security for future advances and responsibilities," and that his future advances, and liabilities incurred, would be covered by the lien of his mortgage, in prefer-

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ence to the claims of junior intervening purchasers or encumbrancers with notice, actual or constructive, of his said mortgage. 4 Kent Com. 176; *Truscott v. King*, 6 N. Y. 147; *Ladue v. The D. & M. Railroad Co.*, 13 Mich. 380; and see 11 Am. Law Reg., N. S., p. 273, and authorities there cited.

Appellee Peter Maier did not aver, in either of the said paragraphs of his answer, a want of notice, actual or constructive, of appellant's said mortgage; and, in the absence of any such averment, it seems to us, that the court below erred in overruling the appellant's demurrers to each of the said paragraphs of Peter Maier's answer.

From what we have said in relation to the fourth and fifth alleged errors, assigned by the appellant, it necessarily follows, that, in our opinion, his sixth alleged error was also well assigned. For, if the second and third paragraphs of Peter Maier's answer were insufficient to entitle him to the relief asked for therein, it is clear that the court below erred in finding that the claim of said Maier, for the sum of five hundred and eight dollars, was entitled to priority over the appellant's mortgage debt, and in rendering judgment accordingly. Under the law, as we have already seen, the liabilities incurred by the appellant for the mortgagor Anton Helbling, relate back to the date of the execution of the mortgage to the appellant, and he has a valid lien therefor, although such liabilities were incurred by him after he had notice of a subsequent mortgage or judgment lien on the same property. The subject-matter of this sixth alleged error was properly assignable as a cause for a new trial, in the appellant's motion therefor, addressed to the court below, and was so assigned, in said motion, as the third cause for such new trial; but we have preferred to consider the questions thereby presented in this connection.

We hold, that the court below erred in its finding, that the appellee Peter Maier was entitled to any priority

over the appellant, and in rendering judgment accordingly.

The construction we have given to the mortgage sued upon by the appellant renders it unnecessary, in our opinion, that we should examine and consider in detail the other alleged errors, assigned by the appellant on the record of this cause. This mortgage, it appears, was duly recorded in the recorder's office of said Vanderburgh county, on the next day after it was executed, to wit, December 30th, 1868. We must hold, therefore, that the appellees, the Scantlins included, had at least constructive notice of the appellant's mortgage, long before they acquired any lien upon the said mortgaged property, or any part thereof.

In their answer and cross-complaint, the appellees, the Scantlins, alleged, among other reasons why their claim against the mortgagor Anton Helbling, should have priority over the claim of the appellant, the following facts, to wit:

"These defendants further aver, as to the claim of the plaintiff, that on the 1st day of March, 1871, aforesaid, the claim of plaintiff, under his said mortgage, embraced no sums now due, but that, since that date, after the organization of said firm of Scantlin, Helbling & Co., with knowledge of the facts heretofore stated, plaintiff made endorsements for said Anton, till the date and record of these defendant's mortgage, such endorsements and claims being then about twelve hundred dollars, as he avers; and, after the date and record of these defendants' mortgage, with full notice of said mortgage and said endorsements by these defendants, plaintiff made a further endorsement, under his mortgage, for the further sum of two thousand dollars, as he avers."

The theory of this allegation manifestly was, that, inasmuch as the appellant made his endorsements for the mortgagor Anton Helbling after he had notice of the

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equitable interest of the Scantlins in the mortgaged property, therefore the claims of the appellant to indemnity, under his mortgage, should be subordinated or postponed to the claims of the Scantlins, under their junior mortgage.

This theory, in our opinion, is in direct contravention of our construction of the appellant's mortgage, and of the law applicable thereto. And yet it seems very clear to us, from the findings and decisions of the court below in this cause, that it was tried and determined in accordance with this theory. For, although the answer and cross-complaint of the Scantlins contained certain other averments, the evident object of which was to establish an equitable estoppel in favor of the Scantlins and against the appellant, it is clear, we think, from the findings of the court below, that there was no finding of any such estoppel. And besides, the finding of the court in favor of the appellee Peter Maier, giving his claim priority over the claim of the appellant, shows very conclusively to our minds, that this cause was tried and determined on the theory above suggested; for in Maier's case there was no pretence of any estoppel, or any other reason for the priority of his claim over that of the appellant, except that the appellant made his endorsements for the mortgagor Anton Helbling after he had notice of the judgment against said Helbling, under which the said Peter Maier derived his claim.

Without any further or special examination of the alleged errors, assigned by the appellant, it seems clear to us, that the findings of the court below, in this cause, were contrary to law; and, for this reason, we hold that the court erred in overruling the appellant's motion for a new trial.

The judgment of the court below is reversed, at the costs of the appellees, and the cause is remanded, with instructions to sustain the appellant's demurrers to the

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answer of Willard Carpenter, and to the second and third paragraphs of Peter Maier's answer, and for a new trial and further proceedings, in accordance with this opinion.

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57	453
1153	599

PRACTICE.—Record.—Supreme Court.—Where the evidence is not in the record, on appeal to the Supreme Court, no question is presented as to whether or not the verdict is contrary to law or the evidence, or as to the amount of the damages assessed.

SAME.—New Trial.—Cause.—Causes assigned as grounds for a new trial, alleging the improper admission or exclusion of evidence, should designate the particular evidence intended.

MARRIAGE CONTRACT.—Breach of.—Action for.—Instruction to Jury.—In an action for a breach of a marriage contract, a finding by the jury, that "there was a marriage contract made between the plaintiff and defendant," is a finding, in effect, that mutual promises of marriage were made by the parties, and therefore the defendant can not complain that the court, in its instructions to the jury, merely referred to such contract as a promise by the defendant to marry the plaintiff.

SAME.—Damages.—Measure of.—The defendant in such action, where seduction under promise of marriage, and the birth of a bastard child, are alleged in aggravation of damages, can not complain of an instruction to the jury, that if the plaintiff had been seduced by the defendant under such promise, and had given birth to a bastard child belonging to him, they might, in assessing the plaintiff's damages, take into consideration the plaintiff's feelings, pain and humiliation in giving birth to such child, but not the care and cost of maintaining and educating it.

NEW TRIAL.—Misconduct of Jury.—Taking Instructions to their Room.—The fact that, when retiring to consult as to their verdict, a jury, by mistake, took to their room the instructions of the court to the jury, but did not use the same, is not ground for a new trial.

From the Clinton Circuit Court.

J. Claybaugh and —. *Campbell*, for appellant.

L. McClurg, *J. N. Sims* and *J. V. Kent*, for appellee.

WORDEN, J.—This was an action by the appellee, against the appellant, for the breach of a contract for marriage,

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the complaint alleging, by way of aggravation, the seduction of the plaintiff by the defendant, and the birth of a child.

Issue; trial by jury; verdict and judgment for the plaintiff.

The following interrogatories were propounded by the defendant, and answers returned thereto by the jury:

"1st. Was there a contract of marriage made between the plaintiff and defendant?

"Answer. There was a marriage contract made between the plaintiff and defendant.

"2d. If there was a marriage contract. when was it made?

"Answer. In the Fall of 1867."

All the other assignments of error are embraced in that upon the overruling of the motion for a new trial.

The following were the causes stated for a new trial:

"1st. That the verdict was contrary to law, and not sustained by the evidence;

"2d. That the verdict of the jury was contrary to the evidence;

"3d. Error of law arising at time of trial, in this, that the court permitted improper testimony, on behalf of the plaintiff, to go to the jury, which was excepted to at the time;

"4th. That the court refused the defendant to introduce proper and legitimate testimony, which was duly excepted to at the time;

"5th. That the court erred in instructing the jury, in this, to wit:

"If the jury should believe, from a preponderance of all the evidence in the cause, that the defendant did not promise to marry the plaintiff, and did not, under such promise of marriage, seduce the plaintiff, then you must find for the defendant. Should the jury however find, from a preponderance of the evidence given in the cause, that the defendant did promise to marry the plaintiff, and,

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under such promise of marriage, did seduce the plaintiff, as alleged in the plaintiff's complaint, and that the result or offspring of the seduction was the begetting of a bastard child by the defendant from [upon ?] the body of the plaintiff, as alleged in the complaint, then and in that case you may, in assessing the plaintiff's damages, take into consideration the begetting and having such bastard child by the plaintiff, as alleged in the complaint, so far as you may consider the plaintiff damaged in feelings, her pain and suffering, her humiliation in mind in having said child by said defendant. But, in such case, you ought not to consider the care, maintenance, education or raising of said child as damages in this cause;'

"6th. Misconduct of the jury, in this, to wit, that the jury took with them to the jury room the instructions, or notes of instructions, of the court, without the consent of the defendant or his counsel;

"7th. That the damages awarded by said jury in their verdict were excessive."

The evidence is not in the record; hence no question arises here on the first, second or seventh causes for a new trial.

The third and fourth are too indefinite to raise any question here. They utterly fail to point out, or in any way designate, the evidence received on the one hand, or that rejected on the other. *Cobble v. Tomlinson*, 50 Ind. 550; *The State, ex rel., etc., v. Wilson*, 51 Ind. 96; *Heady v. The Vevay, etc., Turnpike Co.*, 52 Ind. 117.

This leaves for our consideration the fifth and sixth causes.

It is objected to the instruction set out in the fifth cause, that it implies that the action may be maintained, if the defendant promised to marry the plaintiff, though the plaintiff did not promise to marry the defendant; though, in other words, the promises were not mutual. See *King v. Kersey*, 2 Ind. 402. The main purpose of the charge seems to have been, besides laying down the proposition

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that the verdict should accord with the preponderance of the evidence, to lay down the rule of damages in case the jury should find for the plaintiff. And, in respect to the rule of damages laid down, we think the defendant can not complain.

If the jury may have understood from the charge, that they might find for the plaintiff, upon proof that the defendant promised to marry her, without proof that she promised to marry him, still the charge could have done no possible harm, as the jury found, that, in point of fact, the promises were mutual; in other words, that "there was a marriage contract made between the plaintiff and defendant." This finding implies a mutual contract between the parties.

We pass to the sixth cause—misconduct of the jury. The supposed misconduct is stated in the bill of exceptions as follows:

William Burget, one of the jurors, took with him from the judge's desk a paper containing one page of the notes of the instructions given by the court to the jury in the cause; that he took the paper to the jury room with him; that he looked at it, but did not read it; that he laid it down, and that the paper remained in the jury room during the deliberations of the jury, but that no juror read or examined it at any time; that the paper was taken by the juror by mistake, he supposing it to be the written interrogatories in the cause; that it was returned by him with the verdict and interrogatories into court, he being the foreman of the jury; that the paper was taken by the juror into the jury room, without the knowledge or consent of the court, or of either of the parties or their attorneys.

We are unable to see any misconduct whatever on the part of the jury, or any one of them, or any thing in the circumstances that affords the slightest ground for a new trial. A simple mistake in the juror in taking the paper, supposing it to be the interrogatories, can not be imputed

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to him as misconduct. Then, the mistake did no one any harm, as the paper was not read by any member of the jury. It could, therefore, have had no influence whatever upon their verdict.

The judgment below is affirmed, with costs.

STEINMETZ v. THE VERSAILLES AND OSGOOD TURNPIKE CO.

TURNPIKE.—Directors.—Irregularity in Election.—Action for Stock.—Quo Warranto.—Irregularity in the election of the directors of a turnpike company is no defence to an action by such company to collect stock subscribed by the defendant to its preliminary articles of association, though it might be ground for a *quo warranto* proceeding to oust such directors.

SAME.—Pleading.—Complaint.—Calls by Directors.—Where, in such action, the complaint alleges the election of a board of directors, who then located the turnpike and made calls for the amounts of subscriptions, it is sufficiently shown that such election preceded the making of such calls.

SAME.—Articles of Association.—Location of Towns and Cities.—Judicial Notice.—The articles of association of such company, filed with the complaint in such action, are properly a part of the complaint, and where such articles state the termini of the road to be within a certain county, the courts of this State will take notice that a road running from one of such termini to the other is located wholly in such county.

SAME.—Residence of Subscriber.—The use of a double comma, following the name of a subscriber to such articles of association, under the name of a certain specified locality, sufficiently designates such subscriber's residence.

SAME.—Failure to Designate Residence.—Where such articles fail to designate the residence of some of the subscribers, and improperly designate that of others, but the amount subscribed by those whose residence is rightly designated is sufficient to make the amount required by law, such subscriptions are valid.

SAME.—Judgment.—Appraisal Laws.—Judgment may be rendered in such action collectible without appraisal.

From the Ripley Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellant.

G. Durbin, for appellee.

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WORDEN, J.—This was an action by the appellee, against the appellant, to recover the amount of one hundred dollars, subscribed by the defendant to the preliminary articles of the plaintiff's association.

Demurrer to the complaint, for want of sufficient facts, overruled, and exception.

The defendant answered in five paragraphs. The first, which we suppose was the general denial, was withdrawn. A demurrer was sustained to each of the other paragraphs, and there was final judgment for the plaintiff.

We proceed to consider the points made in the brief of counsel for the appellant.

The complaint alleges, that, after the filing of the articles of association in the office of the recorder of the county, viz., in 1874, "five directors were elected by the stockholders of said company, and proceeded to, and did, locate said road on the route specified in the articles of association, * * * and did, on the 22d day of May, 1874, require payment from subscribers," etc.

Here the complaint goes on to specify the calls made.

The statute requires, that notice of the first election for directors shall be given by two weekly publications in some newspaper printed on or near the route of the road. 1 R. S. 1876, p. 655, sec. 2.

It was urged, that the complaint was bad, because it did not allege that the proper notice had been given of the election for directors. Any irregularity in the election of directors is no ground on which the payment of a subscription for stock can be resisted, though it might be ground for a *quo warranto* to oust the directors. *The Covington, etc., Plank Road Co. v. Moore*, 3 Ind. 510; *Johnson v. The Crawfordsville, etc., Railroad Co.*, 11 Ind. 280. The validity of an election of directors can not be attacked in this collateral way.

In the case of *Miller v. The Wild Cat Gravel Road Co.*, 52 Ind. 51, it was held, that an allegation that the calls were made by the board of directors of the plaintiff was

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sufficient, without alleging, in terms, that a board of directors had been elected, because calls could not have been made by a board of directors unless such board had been elected.

It is also urged, that the complaint was bad, because it did not show that the directors were elected before the calls were made. This is shown by the complaint, as we understand it. The complaint alleges the election of the directors, and that the directors proceeded to locate the road, and to make the calls.

It is further urged, that the complaint should have shown that the road was located in Ripley county only, in order that it might appear that filing the articles of association in that county was sufficient. This is shown by the complaint.

The articles of association, filed with the complaint, are properly a part thereof, because they are the foundation of the action. The articles specify the terminal points of the road, and state them to be in Ripley county, and State of Indiana. Then the complaint alleges, that the road was located on the route specified in the articles of association. The road was to run from the town of Versailles to Osgood, terminating at specified points in each of those places. And we will take notice, that a road running from one of those places to the other will not run out of Ripley county.

The objections to the complaint are not well taken.

We proceed to the answer. The fourth and fifth paragraphs only need be considered, as no objection is urged, in the brief of counsel for the appellant, to the ruling below as to the second and third. The fourth and fifth were substantially alike, but the fourth was pleaded in bar, and the fifth in abatement, of the action.

These paragraphs make the articles of association a part thereof, and allege, that the road was five and one-eighth miles in length, making a stock subscription of two thousand five hundred and sixty-two dollars and fifty

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cents necessary. They allege, that the residence of some of the subscribers was not stated at all in the articles, as required by the statute, and that others were only stated by placing the double comma under the name of a place previously written; and that the place of residence of other subscribers was wrongfully stated, they residing elsewhere than at the place stated. Hence, it was concluded, that there was not a valid subscription for the necessary amount of stock.

In looking at the articles, we find, that, by leaving out of view all those subscriptions where the residence of the subscriber is not stated, and all those whose residence is alleged to have been wrongfully stated, there was a much larger subscription than is required by the statute, if we include those marked by a double comma under a place already stated, thus:

Names of subscribers.	Residence.	No. of shares.	Amount.
William A. Wayland,	Versailles.	1	\$50.00.
Benj. F. Spencer,	"	2	100.00.

We have heretofore had occasion to consider this question, and concluded, that the residence of a party was sufficiently indicated in the above manner. *Miller v. The Wild Cat Gravel Road Co., supra.* We see no reason to change the conclusion then arrived at.

This view renders it unnecessary that we should determine the effect of a mis-statement by a subscriber of his residence.

The court committed no errors in sustaining the demurrers to these paragraphs.

Judgment was rendered collectible without appraisal. This was authorized by the statute. 1 R. S. 1876, p. 661, sec. 19.

The judgment below is affirmed, with costs and ten per cent. damages.

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57	461
141	64
57	461
144	473
144	488

WILL.—Insanity of Testator.—A person who has become the victim of mental derangement, amounting to insanity in any form, is, under the statute of this State, incompetent to make a will.

SAME.—Instruction to Jury.—Partial Insanity.—On the trial of an action to revoke the probate of the will of a testator on the alleged ground of his insanity, an instruction to the jury, that, though the testator might have been, to some extent, insane, yet such insanity would not avoid the will, unless it could be shown to have entered into or affected the will itself, is erroneous.

SAME.—Witness.—Expert.—It is error in the court in such action, in instructing the jury as to the opinions of witnesses regarding the sanity of the testator, and as to the opinions of experts upon hypothetical questions, to direct them as to the weight to be given to such evidence.

SAME.—An instruction to the jury in such case, that "the testimony of experts is usually of very little value in determining the sanity or insanity of a party," is erroneous.

SAME.—Credibility.—The credibility of experts testifying as witnesses is tested by the same rules as are applied to any other class of witnesses.

From the Boone Circuit Court.

W. B. Walls, for appellants.

J. W. Clements, for appellees.

NIBLACK, J.—This was a proceeding, in the court below, to set aside an instrument in writing, with the probate thereof, purporting to be the last will and testament of Hugh Eggers, deceased, late of Boone county.

The plaintiffs Landrine Eggers and Sarah Eliza Brindle were the only children of the deceased, and the other plaintiff, John P. Brindle, was the husband of the said Sarah Eliza. The defendant Sarah Eggers was the decedent's widow, and the other defendants, John Eggers, Lou Brindle and Charles Brindle, were his grandchildren, and all were beneficiaries under the alleged will.

The complaint, as amended before the trial, consisted of two paragraphs.

The first charged, that the instrument in question was

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procured to be executed by the fraud and undue influence of the said Sarah Eggers and others.

The second charged, that, at the time of its execution, the deceased was of unsound mind, and incapable of making a valid will.

The defendants answered in general denial.

There was a trial by a jury, and a verdict and judgment for the defendants.

On the trial, the court instructed the jury, among other things, that

"The symptoms of insanity are quite incapable of description or classification. Insanity is sometimes quite obvious. At other times, it appears in so subtle a form as to elude the observation of the most experienced physicians. The belief in the existence of mere illusions or hallucinations, the creatures purely of the imagination, such as no sane man could believe in, are unequivocal evidences of insanity; but even this would not be sufficient to avoid a will, unless such delusion or insanity had entered into, or affected, the will itself; and where the party has correct perceptions, he will generally be found competent to make an understanding disposition of property and a valid will, unless, from imbecility, he is incapable of estimating the just relations of things, or of fully recollecting the elements of a will."

By this instruction, the court evidently intended to be understood to mean, that, although a person might be, to some extent, insane when he executed a will, yet such insanity would not avoid the will, unless it could be shown to have entered into, or affected, the will itself. Independently of any statutory provision on the subject, that might be considered as the law, as applied to what is termed partial insanity, see 1 Jarman Wills, 4th Am. ed., p. 60. Our statute, however, does not permit a person "of unsound mind" to make a will. 2 R. S. 1876, p. 570, sec. 1.

"The phrase 'of unsound mind,' includes idiots, non

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compotes, lunatics, and distracted persons." 2 R. S. 1876, p. 313, sec. 797. Also, monomaniacs. 2 R. S. 1876, p. 598, sec. 1.

In the case of *Willett v. Porter*, 42 Ind. 250, it was, in effect, decided, that the words "of unsound mind" include every species of unsoundness of mind.

Adhering to that construction, as we feel justified in doing, partial insanity is necessarily included as one of the forms of mental unsoundness. It is often difficult to decide when eccentricity, or a merely capricious imagination, terminates, and when actual mental derangement begins; but when a person has become the victim of a mental derangement, amounting to insanity in any form, we are of the opinion, that, under our statute, he is incompetent to make a will.

We think the instruction was, therefore, erroneous.

The court also instructed the jury, that

"Some witnesses have given their opinions of the condition of the mind of the testator about the time of the execution of the will, basing such opinions upon facts stated by themselves to you. These opinions are a very weak class of testimony, and depend upon the facts stated for weight. If the facts properly support the opinions, those opinions are of some value, but, if they are not supported by the facts, they are of no value whatever. Some persons have been introduced as experts on the question of unsoundness. These witnesses gave opinions based upon hypothetical cases. These opinions are of no value, unless the hypothetical cases put to the experts are fully sustained by the evidence given in the cause. If the hypothetical cases are fully proved by the evidence, and the experts understand the subject upon which their opinions are given, those opinions ought to have some weight, but the testimony of experts is usually of very little value in determining the sanity or insanity of a party. The opinions of experts are not so highly regarded now as formerly; for, while they sometimes afford

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aid in the determination of facts, it often happens that experts can be found to testify to any theory, however absurd; and they frequently come with biased minds, prepared to support the cause in which they are embarked. I do not wish to be understood, that the witnesses called in this case are biased. You are the judges of that matter."

We are of the opinion, that this instruction was also erroneous. It underrated too much the value of the testimony of experts as a class. The value of such testimony depends as much upon all the facts and circumstances connected with each particular case as that of any other class of witnesses. It is for the court first to decide whether a witness is competent to testify as an expert; but, when permitted to testify, an expert stands substantially on the same footing as any other witness as to credibility. His testimony may be valuable, or it may not be, depending upon the manner in which it may be able to withstand the usual tests of credibility which may be applied to it. *Davis v. The State*, 35 Ind. 496.

It is true, as a general rule, that, where the opinion of an expert is founded upon a hypothetical case, his opinion can not be considered of material value, unless the hypothetical case put to him is fully sustained by the evidence. Yet exceptions to this rule may arise, where the hypothetical case is susceptible of division, and a part of it only is sustained by the evidence.

Again, we think the court was mistaken in saying, that "the testimony of experts is usually of very little value in determining the sanity or insanity of a party."

The contrary rather seems to us to be the rule. Touching such an issue, the testimony of experts is usually regarded as an important element in the cause. Our statute for the admission of patients into the Hospital for the Insane fully recognizes the value of medical witnesses when inquiring into cases of alleged insanity.

We do not know on what authority the court said to

the jury, that "the opinions of experts are not so highly regarded now as formerly," and we are inclined to think, that such is not the recognized doctrine of the authorities.

A modern author says :

"The whole system of experts, as now used, is comparatively a modern experiment. It has grown out of the wonderful growth and increase of science in modern days, and the development, by that means, of what was before too recondite to be any thing more than conjectural in the minds even of the wisest." Washburn Experts, 1 Am. Law Rev., p. 62.

Experts may not well understand the subject about which they testify; they may be biased in favor of the party who calls them; they may base their conclusions on false theories or on mistaken premises, or the facts may be against them. These objections, when well taken, go only to their credibility, and we know of no rule which applies them with greater force to experts than to other witnesses.

Both the instructions above quoted being material to the interests involved on the trial, we must presume they affected the minds of the jury injuriously to the appellants.

Other questions of minor importance are presented by the record, but, as they may not again arise in the cause, we will not now consider them.

The judgment is reversed, at the costs of the appellees, and the cause is remanded for a new trial.

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57	466
127	327
57	466
127	451

SUPREME COURT.—*Assignment of Error.*—*Superior Court.*—*Practice.*—An assignment as error, on appeal to the Supreme Court from the Superior Court, that the latter court erred at general term in affirming its judgment at special term, presents for decision all errors properly assigned at general term.

INTERROGATORIES TO JURY.—*Answers.*—*General Verdict.*—Unless the facts found specially by a jury trying a cause, in answer to interrogatories, are inconsistent with their general verdict, the latter must stand.

PRINCIPAL AND AGENT.—*Real Estate Broker.*—*Pleading.*—*Instruction to Jury.*—*Broker Acting for both Vendor and Vendee.*—In an action by a vendor of certain real estate, to recover for moneys alleged to have been collected by the defendant as the broker of the former, and unlawfully detained, the defendant answered, that the plaintiff, with full knowledge that the defendant was acting as the broker of the purchaser in making investments for the latter in real estate, had employed the defendant, at a stipulated commission, to sell such real estate at a specified price; that he had made such sale, receiving from the purchaser a sum exceeding the price of the realty, had paid such price, less his commission, over to the plaintiff, and had retained the excess as the price of his services rendered to the purchaser in making the investment.

Held, that an instruction to the jury trying such cause, that such answer admitted the possession and retention by the defendant of moneys received by him from the sale of such real estate, was erroneous.

Held, also, that, in such case, the defendant might lawfully receive compensation for his services from both vendor and vendee.

From the Marion Superior Court.

J. T. Dye, A. C. Harris, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellants.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellants, as defendants, in the court below.

Appellee's complaint was in three paragraphs.

In the first paragraph of its complaint, the appellee alleged, in substance, that on the — day of July, 1873, the appellants were, and had ever since been, copartners

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in business, under the firm name of G. W. Alexander & Co.; that on or about said day the appellee employed the appellants, as such copartners, to sell certain real estate of the appellee, upon a commission of one and one-half per centum, and the appellants undertook therefor to sell the same, and to procure purchasers therefor, and to pay the proceeds over to the appellee; that thereafter, the appellants did procure said real estate to be purchased by various persons, and did procure from appellee, for delivery to said purchasers, proper deeds, duly executed, conveying to said purchasers the several lots by them respectively purchased; that the appellants, since said sale, had reported to appellee, that said purchases and sales were made for the total aggregate sum of one hundred and eighteen thousand one hundred and thirty dollars, whereas, in truth and in fact, said sales were made by the appellants for a much larger sum, to wit, for the aggregate sum of one hundred and twenty-five thousand dollars, and the amount thereof, in promissory notes, bonds and other securities, and in cash, has been paid by the said several purchasers to the appellants as appellee's agents; that the appellants had accounted to appellee, and turned over, in money, notes, bonds and other securities, on said purchase-money, in all the sum of one hundred and sixteen thousand three hundred and six dollars and twenty-seven cents, and, on demand, had and still wholly failed and refused to account for, or to pay over, any part of the residue of said purchase-money; wherefore the appellee said that the appellants were justly indebted to appellee in the sum of nine thousand dollars, for which sum the appellee demanded judgment.

In the second paragraph of said complaint, the appellee alleged substantially the same facts as in the first paragraph, but with some difference in the phraseology thereof; and, in the conclusion of said second paragraph, it was alleged that the appellants wrongfully, falsely and fraudulently, with the intent to cheat and defraud the appellee,

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had and still failed and refused to render a true and just account of the proceeds of the sales of said real estate, and, on demand, to turn over to the appellee the said notes, bonds, securities and moneys received by them as the appellee's agents; to the appellee's damage in the sum of nine thousand dollars. Wherefore, etc.

The third paragraph of the complaint is merely a common count, by the appellee, against the appellants, for the recovery of said sum of nine thousand dollars, as so much money had and received by the appellants for the use of the appellee, which was due and unpaid. Wherefore, etc.

To the appellee's complaint, the appellants answered specially, in a single paragraph. In giving the substance of this answer, we adopt substantially the abstract thereof, furnished by the learned counsel of the appellants, in their argument of this cause, in this court, as follows:

"The defendants answered specially, that, during the year 1873, they were largely engaged in business, as real estate brokers, and had a large acquaintance as such brokers, in this and other states; that in August, 1873, they learned the University proposed to put a large part of its *campus* in the market, as an addition to Indianapolis; that they then had a large number of customers residing abroad, who were seeking investments through them in city property; that, on the 27th of said month, they selected for some of their customers certain lots, aggregating in all eighteen thousand dollars, at the prices then fixed and established; that they soon after learned that they could furnish customers for a large number of lots, if the price was lowered fifteen per cent. And they then proposed, if the plaintiff would make sales at a discount of fifteen per cent., and also discount the purchases already made of eighteen thousand dollars in the same way, that, for an agreed commission of one and one-half per cent., they would agree 'to take, select immediately, and furnish buyers for, an amount in value of not less than one hundred thousand dollars, of said lots;' that this

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proposition was accepted; that they immediately marked on a plat the lots they undertook to furnish buyers for, under their contract, which was agreed to by Dr. Jameson, acting for the University; that they had furnished buyers for all the lots so taken at said discount price; that the sales had been made, deeds, money and notes passed, according to the terms fixed, and they had fully accounted to the University for the agreed price of said lots, and paid over the proceeds, less their agreed commissions. And that the money received by them from their customers, over the said price agreed on, was paid to and received by them, as and for their compensation for selecting and purchasing said lots for them, and for other services, and not as purchase-money going to the University. The words of the answer are, 'And that any and all other money, received by them on account of such sales and purchases, over and above one and one-half per cent. commission paid by plaintiff, has been paid to them by their customers, as and for their commissions for purchasing said lots for them.'"

Appellee demurred to appellants' answer, for the want of sufficient facts therein to constitute a defence to the action, which was overruled; but no reply was filed to said answer.

The cause was tried by a jury, in the court below at special term, and a general verdict was returned for the appellee, assessing its damages in the sum of one thousand nine hundred and eighty-two dollars and fifty cents. And the jury also, under the direction of the court, at the request of the appellants, returned with their general verdict their special findings upon particular questions of fact, stated to them in writing, as follows:

"1. Did not the defendants, Alexander and Bronson, make a proposition, that if the proposition of The Builders and Manufacturers Association, to buy certain lands of the University, was accepted, they, said defendants, would select at once, and bind themselves to furnish buyers for,

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\$100,000.00 worth of the University lots, at a discount of 15 per cent. from the original prices asked, and that they would receive from the University, as consideration for said contract, 1½ per cent. commission?

"Answer. Yes.

"2. Did not Dr. Jameson afterward inform defendants that their proposition was 'all right,' and that it was accepted?

"Answer. Yes.

"3. Did not Dr. Jameson, on or about the 3d day of September, 1878, go to the office of Alexander and Bronson, and request them to select, and designate on a plat, the lots that they desired to select and furnish buyers for, under their said agreement?

"Answer. Yes.

"4. Did not Alexander and Bronson, at the request of Dr. Jameson, on or about the 3d day of September, 1878, select, and designate on a plat, the lots they desired to select and furnish buyers for, under their said agreement?

"Answer. Yes.

"5. Did not Dr. Jameson accept and take with him, from the office of Alexander and Bronson, the plat upon which defendants had selected and designated the lots they desired to select and furnish buyers for, under their said contract?

"Answer. Yes.

"6. Did not Alexander and Bronson, on or about the 27th of August, 1878, and before they made any contract to select, and furnish buyers for, lots, take and select, as purchasers for Mauzy, some lots on the original plat, at the full original price?

"Answer. Yes.

"7. Did not Dr. Jameson afterward lower the price of these Mauzy lots, and allow them to go in under the contract of Alexander and Bronson to select and furnish buyers for lots at a discount of 15 per cent. from the original price asked?

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"Answer. Yes, for benefit of Mauzy.

"8. Did not defendants show to Dr. Jameson the letter and dispatch from A. G. Mauzy, and the two dispatches from H. S. Walker, introduced in evidence, before Dr. Jameson received from defendants the plat upon which they had selected and marked the lots for which they were to furnish buyers?

"Answer. Yes.

"9. Did not Dr. Jameson know, that defendants, Alexander and Bronson, were acting as purchasers for the Mauzy's and H. S. Walker?

"Answer. Yes.

"10. Have not Alexander and Bronson paid over and fully accounted for all that the lots sold by them amounted to at the discount price?

"Answer. Yes.

"11. Did not Dr. Jameson, on or about the 8d of September, 1873, and immediately after defendants had selected, and marked upon the plats, the lots for which they were to furnish buyers, request Alexander and Bronson not to sell any more lots at a discount of 15 per cent. from the original price asked?

"Answer. Yes."

And the appellants moved the court below, at special term, in writing, for judgment in their favor upon the special findings of facts by the jury, notwithstanding the general verdict; which motion was overruled, and to this decision the appellants excepted.

The appellants then moved the court below at special term, on written causes therefor, for a new trial of this action; and this motion having been overruled, and appellants' exception saved to this ruling, judgment was rendered on the general verdict.

From this judgment, an appeal was duly taken to the court below in general term. On the errors there assigned, the judgment of the court at special term was affirmed by the judgment of the court in general term, from

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which latter judgment this appeal is now here prosecuted.

In this court, the appellants have assigned as error the decision of the court below in general term, in affirming the judgment of the court at special term. This assignment of error presents for our consideration the questions raised by the errors assigned by the appellants in the court below in general term.

These alleged errors were as follows:

1st. That the court at special term had erred in overruling the appellants' motion for judgment in their favor on the special findings; and,

2d. That the court at special term had erred in overruling the appellants' motion for a new trial.

Before we proceed to the consideration of the questions presented by these alleged errors, we deem it necessary to a proper and correct understanding of this cause, that we should put together, in a connected and narrative form, the facts of the case as contained in the special findings of the jury. By applying the answers of the jury to the questions submitted to them, and by using the affirmative, instead of the interrogative, form of language, it will be seen, that the jury specially found the following facts:

The appellants made a proposition, that, if the proposition of The Builders and Manufacturers Association to buy certain lands of the University was accepted, they, the appellants, would select at once, and bind themselves to furnish buyers for, one hundred thousand dollars' worth of the University lots, at a discount of fifteen per cent. from the original prices asked, and that they would receive from the University, as consideration for said contract, one and one-half per cent. commission. Dr. Jameson afterward informed the appellants, that their proposition was "all right," and that it was accepted. On or about the 3d of September, 1873, Dr. Jameson went to the office of the appellants, and requested them to select, and designate on a plat, the lots that they desired to select and

furnish buyers for, under their said agreement. At the request of Dr. Jameson, on or about the 3d of September, 1873, the appellants did select, and designate on a plat, the lots they desired to select and furnish buyers for, under their said agreement. Dr. Jameson accepted and took with him, from the appellants' office, the plat upon which the appellants had selected and designated the lots they desired to select and furnish buyers for, under their said contract. The appellants, on or about the 27th of August, 1873, and before they made any contract to select and furnish buyers for lots, took and selected, as purchasers for Mauzy, some lots on the original plat, at the full original price. Afterward, Dr. Jameson lowered the price of these Mauzy lots, "for the benefit of Mauzy," and allowed them to go in under the contract of the appellants to select and furnish buyers for lots at a discount of fifteen per cent. from the original price asked. The appellants showed to Dr. Jameson the letter and dispatch from A. G. Mauzy, and the two dispatches from H. S. Walker, introduced in evidence, before Dr. Jameson received from appellants the plat upon which they had selected and marked the lots for which they were to furnish buyers. Dr. Jameson knew, that the appellants were acting as purchasers for the Mauzys and H. S. Walker. The appellants had paid over, and fully accounted for, all that the lots sold by them amounted to at the discount price. On or about the 3d of September, 1873, and immediately after the appellants had selected, and marked upon the plats, the lots for which they were to furnish buyers, Dr. Jameson requested the appellants not to sell any more lots at a discount of fifteen per cent. from the original price asked.

These were the facts specially found by the jury trying this cause.

It is manifest, we think, that the facts thus found were not inconsistent with the general verdict of the jury. Every word, paragraph and sentence of the special

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findings may have been, and doubtless were, strictly and literally true; but unless the special findings of the facts are inconsistent with the general verdict, the former will not control the latter in any way. 2 R. S. 1876, p. 172, sec. 337; *Thompson v. The Cincinnati, etc., Railroad Co.*, 54 Ind. 197.

In the case at bar, we utterly fail to see any inconsistency between the special findings of the facts and the general verdict. And, therefore, we hold, that no error was committed by the court below, in overruling the appellants' motion for judgment in their favor on the special findings of facts, notwithstanding the general verdict.

The second alleged error, assigned by the appellants in the court below in general term, was the overruling of their motion for a new trial. In this motion, many causes for such new trial, chiefly alleged errors of law occurring at the trial, were assigned by the appellants. Without setting out these causes at length, we will only consider such of them as the appellants have discussed in their argument of this cause in this court; and, in so doing, we will take up and dispose of these causes in the same order in which their learned attorneys have presented them.

The first alleged error of law at the trial, complained of in argument by appellants' counsel, was the giving by the court at special term, of its own motion, of the second instruction to the jury.

The counsel say of this instruction:

"The second instruction is a prejudiced statement of the defence. It says, the answer admits the possession and retention of moneys, which moneys were received by them on the sale of the property of the plaintiff, etc. Now, it does not admit it was received 'on the sale,' but says it was 'paid to them by their customers, as and for their commissions for purchasing said lots for them.'"

It seems to us, that this instruction is open to the criti-

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cism of the appellants' counsel; not that the statement of the defence is prejudiced, in the ordinary acceptation of the term, for this we do not believe, but that the instruction did not contain a full and entirely fair statement of the defence.

The gist of the appellants' defence, in this case, as we gather the same from their answer, may be thus stated:

That the appellants were real estate brokers of the city of Indianapolis, and as such were employed by the appellee to sell its lots in said city, but not as the appellee's agents, in the usual sense of the term; that they were employed under a special contract, by the terms of which the prices of the lots were fixed by the appellee, and they were not entrusted nor required by the appellee to get any higher price therefor; that, at the same time, they were acting as agents for non-resident parties, in investing moneys for them in city lots in Indianapolis, which fact was known to the appellee's officers and agents; that such investments for their non-resident customers were made by them in certain of the appellee's lots, which they had agreed to furnish buyers for, at the prices fixed thereon by appellee; and that they had fully paid and accounted to the appellee for the full sum and price of all the lots by them sold, at the price fixed and agreed upon by and between them and the appellee; and that any and all other money received by them on account of such sales and purchases, over and above the one and one-half per cent. commission paid by appellee, had been paid to them by their customers, as and for their commissions for purchasing said lots for them.

It will readily be seen, from this statement of the defence, that the appellants' answer, instead of admitting, as the court informed the jury, that the moneys in controversy were received by the appellants on the sales of the appellee's property, expressly averred that all these moneys had been paid to the appellants by their customers, as and for their commissions for purchasing said lots

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for them. It seems to us, therefore, that the appellants have just cause of complaint against the court below at special term, on account of this erroneous statement of their answer to the jury trying the cause.

The appellants' counsel also complain of the second instruction of the court to the jury, because it contained, as they allege, other erroneous statements of the defence in this action. But we do not think it necessary or important for us to make any further examination of these alleged erroneous statements of the defence. We prefer to come at once to the consideration of the question which we regard as the important and controlling question in this case.

In our opinion, that question may be thus stated :

Under the peculiar facts of this case, as stated by the appellants, and which the evidence at least tended to establish, where the appellants negotiated sales between their own customers and the appellee for certain of the appellee's lots, and on which sales they had received from the appellee an agreed commission, might the appellants in such cases lawfully charge and receive commissions from their said customers, for their services in purchasing the lots for their said customers ?

Ordinarily, the law will not allow the same man to act as the agent of both the vendor and purchaser of property.

"The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price ; of the agent of the purchaser to buy it for the lowest." *Farnsworth v. Hemmer*, 1 Allen, 494. See *Story Agency*, sec. 31, and *Rupp v. Sampson*, 16 Gray, 398.

But, while this may be regarded as good and well-settled law, yet it is not applicable to a case in which a man is acting as the agent of both the vendor and pur-

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chaser, with the authority or consent of the parties interested.

Let us see, now, what the case is, which the evidence on the trial tended to establish. The appellee had platted its *campus* into city lots, and put them on the market for sale. The appellants were real estate brokers, and had a large acquaintance in this and other states. Dr. Jameson was the authorized agent of the appellee in the sale of its lots. He sought the services of the appellants in the sale of said lots, because, he says, "I understood he," appellant Alexander, "had customers." It may be assumed, therefore, that the appellee had knowledge of the fact, that the appellants were the agents of their "customers," and that it was consenting thereto. The prices of the appellee's lots were fixed absolutely between the appellants and the appellee. The appellants were neither required nor expected to sell the lots at any other than the fixed price. It was not their duty to sell the lots at the highest price, but their agreement was, to sell one hundred thousand dollars' worth, at the fixed price. No confidence or trust was reposed in the appellants by the appellee.

Says Dr. Jameson :

"The arrangement was, that Mr. Wallace was to assist me and make out the papers, and receive the consideration of each sale as made; Mr. Alexander," one of the appellants, "was merely to negotiate sales."

Certainly, it seems to us, there was nothing in this limited and confined agency which would prevent the appellants, as such agents of the appellee, from acting also as the agents of the purchasers of appellee's lots. Under such an agency, there could be no possible danger, that the rights of the appellee, as vendor, could be sacrificed by the appellants, to promote the interests of the purchasers of said lots. The appellee knew that the appellants were acting as the agents of the non-resident purchasers of lots. It does not appear, that the appellee

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objected to the agency of the appellants for such non-resident purchasers, and, therefore, the inference is, it consented thereto. There was no concealment whatever, by the appellants from the appellee, of the fact of their agency for their "non-resident customers." The jury found specially, that the appellee knew, that the appellants "were acting as purchasers for the Mauzy's and H. S. Walker," their non-resident customers. It can not be said, therefore, with truth or accuracy, that the actions of the appellants as the agents of their non-resident customers, in the sale and purchase of appellee's lots, were any breach or violation of the trust and confidence reposed in them by the appellee. In such a case, our conclusion is, that the appellants might lawfully receive commissions from their non-resident customers, for services in making investments for them in the appellee's lots. And if these commissions, so received by the appellants, were in fact what the evidence before the jury tended to prove they were, the subject-matter of this action, in our opinion, the appellee has no cause of action against the appellants for the recovery of those commissions. *Rowe v. Stevens*, 53 N. Y. 621; *Siegel v. Gould*, 7 Lansing, 177; *Rupp v. Sampson*, 16 Gray, 398, and *Herman v. Martineau*, 1 Wis. 151.

At the proper time, the appellants requested the court below, at special term, to give the jury trying the cause certain written instructions, and among others the following:

"1. An agent, in the ordinary acceptance of the term, can not be the agent of two parties, having adverse interests, without the consent of both; because when he is entrusted with a discretion in buying or selling, he must exercise that discretion and judgment for the benefit of the person employing him. But where he is not invested with a discretion by one of the parties, but his instructions are fixed and determined by the one, he may then, without any violation of his duties, receive an employ-

ment from the other party having adverse interests, and negotiate the affair between the parties to a conclusion; because, as to one of them, he can not change the terms of the proposal, and, therefore, he may act for another, in accepting the terms so fixed and determined. In such a case, his engagement is in a manner two-fold, and in this capacity he may bring about the sale or exchange desired by both parties, and claim a compensation from each."

"2. So that, if you shall find from the evidence, that Dr. Jameson, as agent of the plaintiff, agreed with the defendants, that they should take and sell for plaintiff certain of the lots, then being offered for sale by plaintiff, for a certain and definite price fixed and agreed upon by and between the defendants and said Jameson, for which the defendants were to take and receive an agreed commission, viz., one and one-half per cent. on the purchase-price, and that this agreement was made within the scope of Dr. Jameson's authority, as agent of the plaintiff, and that defendants have sold said lots for the agreed price, and have fully accounted to plaintiff for the proceeds received therefor, less the stipulated commission, then they are not liable to plaintiff in this action, although they may have received from the purchasers of said lots a sum for conducting the negotiations, receiving and paying out the notes and money, and superintending the transactions, and receiving the deeds and other papers for them."

The court below, at special term, refused to give the jury the foregoing instructions, nor did the court give the jury any instructions of similar tenor and purport. To the decision of the court, in refusing said instructions, the appellants excepted, and assigned the same as alleged error of law occurring at the trial, as a cause for a new trial, in their motion therefor. For the reasons already given, it seems to us that these instructions were applicable to the case which the evidence tended to establish,

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and should have been given, as requested, to the jury trying the cause.

In our opinion, the court below, at special term, erred in overruling the appellants' motion for a new trial; and, for this reason, we hold that the court in general term also erred in affirming the judgment of the court at special term.

The judgment of the court below, in general term, is reversed, at the appellee's costs, and the cause is remanded with instructions to reverse the judgment of the court at special term, with costs, and to remand the cause for a new trial, in accordance with this opinion.

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57	480
130	206
57	480
136	256
57	480
140	676

INTEREST.—*When Allowed without Contract.*—Interest may be allowed in an action for money due, where payment thereof has been unreasonably delayed, even where it has not been stipulated for.

MECHANIC'S LIEN.—*Action to Enforce.*—*Notice.*—*Burden of Proof.*—A mechanic's lien for labor or materials can not be enforced unless the notice of such lien has been filed for record within sixty days after the completion of the labor or the furnishing of the material; and that fact must be affirmatively shown by the person seeking the enforcement of such lien.

INTERROGATORIES TO JURY.—*When Refused.*—*Practice.*—The court may refuse to submit interrogatories to a jury, which they are asked to answer, not in the event that they return a general verdict, but absolutely.

SAME.—*Interrogatories by Court.*—*Abuse of Discretion.*—The court may, of its own motion, put proper interrogatories to a jury; but an abuse of this power will be error.

CONTRACT.—*Pleading.*—*Misjoinder of Causes.*—*Evidence.*—*Harmless Error.*—*Practice.*—A demand for recovery for extra services ought not to be joined in the same paragraph of a complaint for particular services rendered pursuant to a contract therefor; but, if so joined, error in the admission of evidence of the former is harmless, where the court or jury trying the cause specifically refuse any allowance therefor.

SAME.—*Evidence Explaining Contract.*—In an action to recover for materials

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furnished for a building pursuant to a contract prescribing that the amount of such materials so furnished should be ascertained by a certain rule of measurement used by builders, evidence as to the nature of that rule, as applied by the plaintiff in the measurement of buildings erected subsequent to the making of such contract, is inadmissible.

SUPREME COURT.—*Harmless Error.*—Where no harm results from a ruling of the court to the party complaining thereof, it is not available as error.

PRACTICE.—*Trial.*—*Recalling Witness.*—The court, during the progress of a trial, may, in its discretion, permit a witness who has once testified to be recalled.

EVIDENCE.—*Hearsay.*—Hearsay evidence as to a material matter in controversy is inadmissible.

INSTRUCTION TO JURY.—*Assumption of Fact.*—An instruction to the jury, informing them as to what certain witnesses have testified, is erroneous.

From the Spencer Circuit Court.

C. L. Wedding, R. G. Evans, G. L. Reinhard and E. M. Swan, for appellants.

C. H. Mason and J. W. Laird, for appellee.

PERKINS, J.—Suit by the appellee, against the appellants, who are the trustees of St. Bernard's Catholic Church of Rockport, Spencer county, Indiana, upon a special contract for erecting the walls of a church building.

A copy of the contract is made a part of the complaint.

The complaint consists of a single paragraph, and alleges completion of the contract on the part of the appellee, and a breach on the part of the appellants, by failing to pay, according to the contract, for the erection of the church.

Appended to this complaint on the special contract is this bill of particulars:

"St. Bernard's Catholic Church,

To Philip Eigenmann, Dr.

"To furnishing and laying in the wall six hundred and thirty-three thousand six hundred and sixteen brick, at nine dollars and fifty cents per thousand, . . . \$6,020 35

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"Extra work on said church, as ordered by the trustees,	\$130 00
"Interest,	54 00

"Bal. due plaintiff,	\$6,204 35
--------------------------------	------------

"PHILIP EIGENMANN."

The complaint avers, that notice of intention to hold a lien on the property had been duly given and recorded, and prayed a decree for enforcement thereof.

A copy of the notice was filed with the complaint.

The contract upon which the suit was brought is in words following:

"This agreement, made this nineteenth day of January, 1875, by and between John Kerstein, Albert Killian, John Fischer and Ignatz Quick, trustees of the St. Bernard's Catholic Church of Rockport, Spencer county, Indiana, of the first part, and Philip Eigenmann, of the second part, witnesseth: That the party of the first part have employed the party of the second part to build a church house in Rockport, Spencer county, Indiana, corner of Elm and Sixth streets, where the foundation of said church is now laid; the said Eigenmann to do the brick-work on said church; the said church to be built in all respects according to the specifications and plans drawn up and furnished said Eigenmann this day, being the same as the specifications and plans of the Cedar Grove, Indiana, Catholic Church, except that an addition of one sanctuary and two sacristies are [is] to be built in the rear end of the main building, specifications of which are to be furnished hereafter. The said Eigenmann is to furnish all the materials except rock, and to do all the work, including the laying of stone and brick, and is to receive, for his compensation, nine dollars and fifty cents per thousand brick, after building masons' measurement. The said Eigenmann is to commence his work on said building not later than April 1st, 1875, and to complete the main building of said church by August 1st, 1875, and the steeple

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and entire job by September 1st, 1875. The said Eigenmann is to receive five hundred dollars of his pay, on or before April 1st, 1875, and afterward he is to receive fifty per cent. of his pay as the work progresses, inclusive of the five hundred dollars to be paid April 1st, until the completion, when he shall receive the balance. The said Eigenmann is to furnish good material, and do the work on said building in a good workmanlike manner.

"Witness our hands, this 19th of January, 1875, at Rockport, Spencer county, Indiana.

(Signed,)

"JOHN KERSTEIN,

"ALBERT KILLIAN,

"IGNATZ QUICK,

"JOHN FISCHER,

"Trustees of St. Bernard's Catholic Church, Rockport, Spencer county, Indiana.

"PHILIP EIGENMANN."

A notice of a mechanic's lien, addressed to said trustees by name, but as trustees of said church, and to their successors in office, and to the Bishop of Vincennes, follows;

"Take notice, that I intend to hold a lien on the real estate described as follows: Commencing at the southwest corner of Out-lot No. 6, in Wm. R. Hynes' Donation to the town of Rockport, Spencer county, Indiana; running thence west one hundred and seventy-one feet, to the State road; thence north two hundred and twelve feet, along said State road; thence east one hundred and seventy-one feet, to the beginning; together with the church building situated thereon, for the sum," etc.

Dated December 14th, 1875, and signed Philip Eigenmann.

Endorsed:

"Filed 8 A. M., 15 December, 1875, and recorded in Lien Record No. 1, page 142. L. E. RIGGS, R. S. C."

The appellants answered in three paragraphs:

1. The general denial;
2. Payment; and,

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3. Denying that the work had been done according to contract, giving specifications of omissions, alleging damages resulting in an amount greater than the contract price of the work, and praying a judgment for five thousand dollars against the appellee.

Reply:

1. A general denial; and,

2. Alleging that the failure to complete the building, averred in the third paragraph of answer, was caused by the fault of appellants.

The issues in the cause were tried by a jury, who returned a general verdict of over two thousand dollars in favor of the plaintiff, and that he have a mechanic's lien, etc., and also returned with their verdict the following answers to interrogatories:

"1. How many thousand brick did the plaintiff lay in the building, according to building masons' measurement?

"Answer. We, the jury, find that the plaintiff laid five hundred and seventy-one thousand one hundred and fifty-five brick.

"2. What amount of damages, if any, have the defendants sustained on account of non-performance by the plaintiff in laying said brick according to contract?

"Answer. Not any.

"3. What amount, if any thing, is due the plaintiff for extra work?

"Answer. Nothing.

"We, the jury, find that there is due plaintiff fifty-four dollars and eight cents, as interest due on said judgment.

"ABSALOM HACKLEMAN, Foreman."

A motion for a new trial was made by the defendants, for the following reasons:

1. Excessive damages in the amount of fifty-four dollars, being the interest found due by the jury;

2. Verdict contrary to the law, and not sustained by the evidence;

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3. Error of law occurring at the trial, in this, that the court refused to submit to the jury the twenty-seven interrogatories asked by the defendants, and submitted, in lieu of them, the three which were answered by the jury;

4. Permitting the plaintiff, Eigenmann, to testify, over the defendants' objections, to extra work claimed to have been done on the building, and refusing to permit George Procaskey, a defendant, to testify whether he, as one of the building committee, knew, at the time of making the contract, what the plaintiff's rule of measuring brick work was; also, in allowing the plaintiff, after both parties had introduced their evidence and rested, to recall J. K. Frick, and allow him to testify, over the defendants' objections, to his mode of measurement, and that it was the only correct one; and in permitting, in like manner, over like objections, J. D. Armstrong to be recalled, and to testify as to what was building masons' measurement, and that Frick's was correct; and that William Reynolds had told him that Frick's rule was the correct one; and,

5. Giving instructions from one to fourteen inclusive.

The motion for a new trial was overruled, and exception taken.

The only alleged error, assigned in this court, is the overruling of the motion for a new trial. This requires the court to consider and decide upon the validity of the causes assigned for a new trial.

We will notice them in the order of their assignment:

1. Interest may be allowed by the court upon trying a cause, in a case where money is due, and its payment unreasonably delayed. 1 R. S. 1876, p. 600, sec. 4.

2. The evidence is in the record, and tends to sustain the verdict, except as to the mechanic's lien. By the contract, the work was to be completed by September 1st, 1875. It was not finished by that time, owing to the fault of the defendants; but it appears to have been finished by the 1st of October, at least; and the burden was upon the plaintiff to show when it was completed,

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in order to show that his notice of lien was filed within sixty days thereafter. The notice was filed on the 15th of December, 1875, which was too late. See 2 R. S. 1876, p. 268, sec. 650, and notes.

Whether the verdict is shown to be illegal, will appear from what will be said hereafter.

3. The court may refuse to submit interrogatories to the jury, which are asked to be answered by them absolutely, and not in the event that they return a general verdict. *Hopkins v. Stanley*, 43 Ind. 553. The court may direct a jury to answer interrogatories propounded of its own motion. See *Weatherly v. Higgins*, 6 Ind. 73. But abuse of this power might be error.

4. The plaintiff had incorporated in his bill of particulars filed an item for extra work. The defendants did not, as they should have done, move to have it struck out. As the complaint was upon the special contract alone, the claim for extra work should have been set forth in an additional paragraph for work and labor done, etc. This suit was not commenced before a justice of the peace. But as the jury disallowed this item of his claim, it does not appear that the defendants suffered any harm by the error, if error it was, in permitting the testimony of the plaintiff touching this item.

The defendants asked witness Procaskey this question, "Are you acquainted with the rule for measuring brick work, followed by the plaintiff, on buildings he put up here, in Rockport, about the time of making this contract, and if so, state what his custom is?"

On objection, the court refused to permit the question to be answered, and the defendants excepted. The contract sued on provided that the quantity of brick for which plaintiff was to be paid should be determined by masons' measurement; and the testimony on the trial tended to show that there was not uniformity in the manner of measuring, by what was termed masons' measurement; and we suppose the excluded question was asked with

the view of proving, that, before the trustees made the contract sued on, Eigenmann had erected buildings in Rockport, and had measured them by some kind of masons' measurement, and that the trustees might be supposed to have contracted, in this case, with a view to that rule. But the question does not fix the time when the buildings referred to were erected. They might have been erected after the contract, in this case, was made, and still been within the question; and the question calls for his rule of measurement at the time of the trial of this cause. The parties against whom the ruling was made do not show that they were injured by it. *Cones v. Binford*, 54 Ind. 516, is in point. See, also, *The Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Chamncss v. Chamness*, 53 Ind. 301, and numerous cases cited; *Mitchell v. Chambers*, 55 Ind. 289; *Graeter v. Williams*, 55 Ind. 461. As to permitting witnesses to be recalled, the court has a discretion in this matter, and we can not say that it appears to have been abused in this case.

The court did err in permitting J. D. Armstrong to testify to the statements of William Reynolds, as to the character of Frick's rule of masons' measurement. It was hearsay testimony, and upon an important and controverted point. The jury found specially that the defendants were not entitled to recover on their answer, by way of counter-claim, for damages. This finding was upon the two issues made by the reply to this paragraph of answer:

1. A general denial;
2. That the damages were occasioned by the fault of the defendants.

We say nothing as to the form of pleading in the case. We look to the substance alone. We think, if the delay and damage complained of were caused by the fault of the defendants, the finding of the jury on these issues may be upheld.

We turn now to the instructions of the court.

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Number eight follows :

“Mr. Frick states that he is an architect, and that he measured the brick work, and it contains 634,706. Mr. Bellamy states that he is an architect, and that he measured the same brick work, and that it only contained 478,768, making a difference between these two measurements of 145,938. It is for you to say, after carefully considering the evidence of Mr. Frick and Mr. Bellamy, the architects, and all the other evidence of the other witnesses, as to the number of brick laid in building said church, and, from the evidence, say what number of brick was laid by plaintiff in building said church.

“Given and excepted to.

“WEDDING & EVANS,

“REINHARD & SWAN,

“For defendants.”

This instruction is erroneous. It states positively to the jury what the testimony of witnesses was upon a material point. It was not for the court, but for the jury, to say what the testimony of the witnesses was. And the latter part of the instruction does not cure the error in the former; for, while it says to the jury that they are to determine the particular fact in dispute, of which he was speaking, from the testimony of all the witnesses touching it, the court had assumed to tell them positively what the testimony of two of the witnesses was, and upon which they might have felt bound to act, as being the testimony of those witnesses.

There are other alleged errors insisted upon, but they will not probably be repeated on another trial.

The judgment is reversed, with costs, and the cause is remanded for further proceedings, in accordance with this opinion.

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87	489
129	489

DEACON v. POWERS, GUARDIAN.

REFLEVIN.—Pleading.—Justice of the Peace.—Title to Lands.—Answers to Interrogatories.—Motion in Arrest.—Supreme Court.—In an action by the guardian of certain minors, to recover possession of certain property, commenced before a justice of the peace and thence appealed to the circuit court, the complaint alleged that the defendant had unlawfully entered upon certain real estate, belonging to such minors and another as tenants in common, and had cut down and converted into logs certain timber growing thereon, and had unlawfully carried the same away; that such logs were the property of such tenants in common; that the defendant unlawfully detains such logs from the plaintiff, "who is entitled to the possession thereof;" and that the same have not been taken by virtue of any execution, etc. Upon issue formed by an affidavit denying that the plaintiff was such guardian, there was a trial resulting in a general verdict for the plaintiff, and in special findings that no demand had been made before suit, that one of such wards was of age, and in possession of such real estate, at the commencement of the suit, and that such tenants in common were the owners of such real estate and logs.

Held, on appeal to the Supreme Court, the evidence not being in the record, that it does not appear that the title to real estate was in issue.

Held, also, that, under the allegations of the complaint, the plaintiff could, and the Supreme Court will presume he did, introduce evidence entitling him to the verdict.

Held, also, that the answers to interrogatories are not inconsistent with the general verdict.

Held, also, on motion in arrest, that the complaint is sufficient, the allegation as to the title of the land being immaterial, and the gist of the action being merely as to the right of possession of the logs.

From the Cass Circuit Court.

M. Winfield, for appellant.

D. P. Baldwin, for appellee.

BIDDLE, C. J.—Thomas Powers, as guardian of certain minor children, brought this suit before a justice of the peace, alleging in his complaint, that said minors and Francis M. Crume were the owners in fee-simple of certain undivided lands, described; that the appellant wrongfully entered upon said lands, cut down and hauled away certain black walnut saw-logs; that said logs are unlawfully detained from the plaintiff, who is entitled to the posses-

Deacon v. Powers, Guardian.

sion thereof; that they are owned by said minors and Crume, and have not been taken from them by virtue of any execution, or any other writ. Wherefore they demand judgment for the recovery of said logs, etc.

The formal averments of date, venue, value, etc., are properly made in the complaint.

Judgment in favor of the appellee before the justice, from which the defendant below appealed to the circuit court, wherein a trial by jury was had, and a verdict found in favor of the appellee. Besides the general verdict in favor of the appellee, and the answers to ten special interrogatories, none of which are inconsistent with the general verdict, the jury answered certain other special interrogatories propounded on the motion of the appellant, as follows:

"1. Did not the defendant, William C. Deacon, purchase the property in controversy from one of the heirs of Francis M. Powers, deceased, in good faith, believing that he was of age and had the right to sell?

"Answer. No proof.

"2. If you answer question No. 1 in the affirmative, was there any demand of the defendant for the property before the commencement of this suit?

"Answer. No.

"3. Was not Mary E. Powers, one of the heirs of Francis M. Powers, deceased, and having an interest in this property, of the age of twenty-one years at the commencement of this suit?

"Answer. Yes.

"4. If you answer question No. 3 in the affirmative, was she not in possession of the lands as a tenant in common with the guardian and Crume?

"Answer. Yes."

Besides these interrogatories and answers, there were two moved for by the appellee, which, with their answers, are as follows:

"3. Did not said Crume and said children own the

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lands from which the logs in controversy were taken, at the commencement of this suit?

"Answer. Yes.

"8. Were not said Crume and said children the owners of said logs at the commencement of this suit?

"Answer. Yes."

Exceptions were reserved to the overruling of a motion in arrest of judgment, and the court, upon the general verdict and special findings, and over a motion for a judgment in favor of appellant on the special findings, rendered judgment for the appellee. The appellant laid the proper foundation and took his appeal to this court.

Enough of the proceedings are thus stated to present the questions discussed by the appellant in his brief, which are but two:

"1st. The action of the court in overruling appellant's motion for a judgment on the answers of the jury to interrogatories.

"2d. The overruling the motion in arrest of judgment."

The appellant insists, that the title to the lands was put in issue before the justice of the peace, and, therefore, that he had no jurisdiction to try the case. The title to land was not put in issue by plea supported by affidavit; and, as the evidence is not before us, we can not say that it manifestly appeared from the proof to be in issue. 2 R. S. 1876, p. 607, sec. 12.

There was a plea sworn to and filed before the justice of the peace, but it only put in issue the guardianship of the appellee. The title to lands, therefore, was not in issue. *Maxam v. Wood*, 4 Blackf. 297; *Rogers v. Perdue*, 7 Blackf. 302; *Wolcott v. Wigton*, 7 Ind. 44.

The following cases touching the jurisdiction of the late court of common pleas, where the title to real estate came in question, are based upon the same principle: *Carver v. Williams*, 10 Ind. 267; *Harvey v. Dakin*, 12 Ind.

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481; *Spears v. Featheringill*, 14 Ind. 402; *Macy v. Allee*, 18 Ind. 126.

It is also urged on behalf of the appellant, that, as the answers to the special interrogatories show that Mary E. Powers was twenty-one years of age at the time this suit was commenced, and that Francis M. Crume was part owner of the lands as a tenant in common with the minor plaintiffs below, and also a joint owner of the logs at the commencement of the suit, therefore the appellee, as guardian, can not maintain this action. And, as a legal principle, it is insisted, that "a part owner of a chattel can not maintain replevin for his undivided interest."

We concede that a part owner of a chattel, as a tenant in common with other owners of the same chattel, can not, merely on the ground of his partnership, maintain replevin for the possession of the chattel so owned in common; but if he alleges an unlawful detention, and his title to possession, he may prove such facts, even against his co-tenants in the general ownership of the property. Admitting, therefore, all that the appellant claims, we can not say, without the evidence before us, that the judgment in this case is wrong. It was only necessary that the appellee should prove the unlawful detention of the logs and his right to their possession, to maintain his action; and, conceding that the ownership of a chattel raises the presumption of the right to its possession, it is only a presumption which may be overthrown by evidence. We can not say, therefore, that no such evidence was given. In other words, we can not allow a presumption of law, which may be rebutted by evidence, to disturb a verdict found against it, when the evidence is not in the record. Under the pleadings, any legitimate evidence was admissible to prove, that, notwithstanding the majority of Mary E. Powers and the part ownership of the logs in Crume, the detention was unlawful, and the right of pos-

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session was in the appellee; and, in favor of the verdict, we must presume that such evidence was given.

We think the motion in arrest of judgment was properly overruled.

The complaint is sufficient. It describes the personal property, alleges the ownership, the unlawful detention, and the right to possession, and that the same has not been taken by virtue of any execution, or other writ against the plaintiff. 2 R. S. 1876, p. 628, sec. 71.

The allegation as to the title of the lands from which the logs were averred to have been cut is immaterial. The complaint is sufficient without it. Any proof by proper evidence as to the title of the logs would support the case.

The judgment below is affirmed, with costs.

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57	493
145	521
57	493
164	521

FORMER ADJUDICATION.—*Judgment without Jurisdiction.*—*Pleading.*—*Promissory Note.*—*Summons.*—Where, to the complaint in an action upon a promissory note, the defendant answers former adjudication, setting out a transcript thereof, which shows a judgment by default upon insufficient notice, a reply that such judgment-defendant had no notice of such suit, and that the court had no jurisdiction over him therein, is sufficient.

SAME.—*Verbal Agreement Contradicting Writing.*—An answer in such action, alleging a contemporaneous verbal agreement varying the terms of the note, is insufficient.

PRACTICE.—*Informal Demurrer to Insufficient Pleading.*—The sustaining of an informal demurrer to an insufficient paragraph of answer is not ground for reversing a judgment rendered upon an issue formed by the general denial.

From the Wells Circuit Court.

W. J. Davis, for appellant.

BIDDLE, C. J.—Suit on a promissory note made by the appellant to the appellees.

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Answer in five paragraphs.

The first sets up a former judgment on the same note against the appellant, in favor of the appellees, making the transcript an exhibit.

Reply to this paragraph, that the appellant had no notice of the suit, and the justice of the peace rendering the judgment had no jurisdiction over the person of the defendant therein.

A demurrer was overruled to the reply, and exception reserved.

There is no error in this ruling. The judgment was rendered by default. The transcript does not contain the summons, and shows no sufficient notice to the defendant. The appellees could properly treat it as a nullity, and sue upon the original cause of action.

The second, fourth and fifth paragraphs each set up a contemporaneous verbal agreement, varying the terms of the note.

A demurrer was sustained to each of these, and exceptions reserved.

The appellant labors, in his brief, to show us, that this demurrer should have been overruled on account of its informality, notwithstanding each paragraph is insufficient.

We do not concur with this view. Besides, we could not reverse a judgment for the irregular disposition of insufficient paragraphs of answer, after the cause has been tried upon a good issue, which sustains the judgment.

The third paragraph is the general denial.

Upon this issue, the case was tried and the judgment rendered.

There is no available error in the record.

The judgment is affirmed, with costs and ten per cent. damages.

The Western Union Telegraph Company v. Ferguson.

THE WESTERN UNION TELEGRAPH COMPANY v. FERGUSON.

TELEGRAPH COMPANY.—*Transmitting Message.*—*Character of Message.*—Upon payment or tender of its usual charges, a telegraph company is bound by law to transmit any message couched in decent language, which is placed in the hands of its agent, for that purpose; though it may refuse to transmit one couched in indecent terms.

SAME.—*Action for Damages.*—*Defence.*—*Pleading.*—*Immoral Intent of Plaintiff.*—In an action against a telegraph company, to recover the statutory penalty for refusing to transmit a proper message, an answer alleging such message to have been intended for an immoral purpose is insufficient.

SAME.—*Pleading.*—*Evidence.*—In an action against a telegraph company for damages for failure to transmit a message, the plaintiff must aver in his complaint, and prove on the trial, that the defendant has a line of wires wholly or partly in this State, that it is engaged in telegraphing for the public, and that a particular message was placed in the hands of its agent, for transmission.

From the Pulaski Circuit Court.

D. P. Baldwin and M. Winfield, for appellant.

Howk, J.—The appellee was the plaintiff, and the appellant was the defendant, in this action, in the court below.

Omitting the title of the cause, the venue and style of the court, and the signature of counsel, the appellee's complaint was as follows:

"The plaintiff complains of the defendant, and says, that on the 23d day of September, 1874, he placed in the hands of the defendant's agent, at Francesville, Indiana in said county, the following message, to wit:

"'Clint. Crose, Lafayette, Indiana:

"'Send me four girls, on first train to Francesville, to tend fair.

E. FERGUSON.'

"That said message was left at said office during the usual business hours, and was to be transmitted to said Clint. Crose, Lafayette, Indiana, without delay; the said plaintiff paying in advance for the transmission of said message the sum demanded by the agent of said com-

The Western Union Telegraph Company v. Ferguson.

pany, at the time he delivered said message; that the defendant, without cause, wrongfully, wholly failed and refused to transmit said message at all, to the damage of the plaintiff one hundred dollars, which has never been paid, either in whole or in part, as shown per exhibit 'A,' herewith filed and made a part hereof; and the plaintiff prays, that he have judgment for the statutory penalty in such cases made and provided, in the sum of one hundred dollars, and other proper relief."

The exhibit, referred to in said complaint, was a simple statement of account, showing that on September 23d, 1874, appellant was indebted to appellee, for damages and penalty for not transmitting a message, in the sum of one hundred dollars.

To the appellee's complaint, the appellant answered in five paragraphs, as follows:

"1. For answer herein, defendants deny each and every allegation in the complaint herein contained.

"2. They say, the dispatch was offered by the plaintiff for an illegal purpose, to wit, to obtain prostitutes to be used at a fair held, or to be held, at Francesville, Indiana, for purposes of prostitution; that the said plaintiff was a lewd man, and of bad and licentious character; that the said Clint. Crose was also a lewd man; that he is, and was at the time, an agent and keeper of prostitutes; that, in their offices, defendants have employed a large number of ladies of refinement and intelligence, and they say, they were not bound to transmit any such message, and that they refused the same, as they lawfully might, because the same was, and is, illegal and immoral, and was offered in aid of immorality and illegality, and they could not send said dispatch without becoming parties thereto.

"3. That said message was not sent in good faith, but was delivered to defendant, by plaintiff, for the purpose of obtaining the penalty of one hundred dollars, by the statute provided in case of refusal to transmit *bona fide* dispatches.

"4. That said message was not sent, because other messages were in the office at Francesville, Indiana, in advance of this; that it contained no directions; that thereby the same was not entitled to be forwarded until after the necessary inquiries were made as to whether there was any such person at Lafayette, and until after their other usual business was disposed of; that, before such inquiry could be made, the plaintiff called upon this defendant, received back his money, and discharged said defendant from any duty or obligation she was under to transmit the said message. Wherefore defendants say, that the plaintiff ought not to recover in the premises.

"5. The defendant, for a fifth and further answer herein, says, that the message in question is ambiguous; that the plaintiff is, and was at the time, a man of loose morals and of bad repute at Francesville, Indiana; that the said Clint. Crose was a man of bad repute, and was, before the date of the alleged default of this defendant, in jail.

"That, acting upon these facts, and that there was to be a large number of persons assembled at the Francesville fair, the defendant had reasonable cause to believe, and did believe, that said message referred to prostitutes, and was to be sent to draw prostitutes to said fair; and defendant, on that account, refused to send the same, as an illegal and unlawful message, which refusal she was authorized to make.

"Wherefore defendants demand judgment against the plaintiff."

The appellee demurred to each of the paragraphs, except the first, of the appellant's answer, for the alleged insufficiency of the facts therein to constitute a defence to appellee's action; which demurrers were overruled as to the second and fourth paragraphs, and sustained as to the third and fifth paragraphs, of said answer, to which latter decisions the appellant excepted. And the appellee

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replied to the second and fourth paragraphs of appellant's answer by a general denial of the matters alleged therein.

And the action, being at issue, was tried by a jury in the court below, and a verdict was returned for the appellee, assessing his damages at the sum of one hundred dollars.

The appellant's written motion for a new trial having been overruled by the court below, and its exception saved to such ruling, judgment was rendered on the verdict.

In this court, the appellant has assigned the following alleged errors of the court below :

1st. In sustaining the appellee's demurrer to the third paragraph of the appellant's answer;

2d. In sustaining the appellee's demurrer to the fifth paragraph of the appellant's answer;

3d. In overruling appellant's motion for a new trial; and,

4th. In overruling the appellant's motion for judgment on the pleadings herein.

It seems to us, that no error was committed by the court below in sustaining the appellee's demurrers, either to the third or fifth paragraphs of the appellant's answer. We know of no provision of law which would authorize the appellant, or any of its agents, to inquire into or impugn the motives of any one who might desire to transmit a message, couched in decent language, over the appellant's telegraphic lines. And certainly we are not aware of any law which makes the appellant, or any of its employees, a censor of public or private morals, or a judge of the good or bad faith of any party who may seek to send a dispatch over the appellant's lines. If the message offered for transmission is expressed in decent language, "on payment or tender of the usual charge," the duty of the telegraph company is fixed by law, and it has no discretion. If, however, the message is expressed in indecent, obscene or filthy language, then, in our

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opinion, the telegraph company will be excused from the transmission of any such message. But such was not the message described in appellee's complaint.

In our opinion, the court below did not err in sustaining the appellee's demurrers to the third or to the fifth paragraph of the appellant's answer.

Among the causes for a new trial, assigned by the appellant in its motion therefor, addressed to the court below, was this, that the verdict of the jury was not sustained by sufficient evidence.

It is a clear proposition, that the appellee's complaint, in this case, did not state facts sufficient to constitute a cause of action. This point was presented to the court below by appellant's motion in arrest of judgment; but the decision of that court, in overruling that motion, has not been assigned as error in this court.

Under the provisions of the statute, entitled "An act to regulate electric telegraph companies," approved May 18th, 1852, which provides a penalty for a failure to transmit a telegraphic message, it is not every telegraph company which is subjected to such penalty for such failure, but it is the telegraph company which has "a line of wires wholly or partly in this State," and which is "engaged in telegraphing for the public," that is made amenable to the penalty prescribed by our statute for the failure to transmit a message, "on payment or tender of the usual charge." 1 R. S. 1876, p. 868, sec. 1.

It was necessary, therefore, that the appellee should aver in his complaint, in order to state a good cause of action, that the appellant had a line of wires, wholly or partly in this State, over which it might have transmitted his message, and that it was engaged in telegraphing for the public; for these were facts which must exist, or the appellee could not lawfully recover, and of the existence of which neither the court below nor this court could take judicial notice. Therefore, it was not only necessary that these facts should be averred in appellee's com-

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plaint, but, whether averred or not, it was indispensably necessary, that these facts should be established by sufficient evidence, on the trial of this cause, to entitle the appellee to a recovery. There was no evidence introduced on the trial in the court below, which tended, even in the remotest degree, to establish either one of the facts referred to.

In another point of view, it seems clear to our minds, that the verdict of the jury, in this case, was not sustained by sufficient evidence. It will be observed from appellee's complaint, as the same is contained in this opinion, that the appellee averred therein, that he placed in the hands of the appellant's agent, at Francesville, Indiana, a particular message, setting it out in full. While it might not have been necessary to prove the precise contents of the message, as the same is set out in the complaint, yet it was necessary, in our opinion, to identify the message set out, by the evidence, with reasonable certainty. The appellee failed to show, by any evidence, that he placed any message in the hands of the appellant's agent at Francesville, Indiana, or to identify by the evidence the message set out in the complaint, by the address, by the signature, or in any other manner.

In our opinion, the court below erred in overruling the appellant's motion for a new trial.

The judgment of the court below is reversed, at the costs of the appellee.

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WILLMAN v. WILLMAN ET AL.

DIVORCE.—*Decree without Jurisdiction.*—A decree of divorce rendered by a court having no jurisdiction of the subject-matter, or of the parties, may be annulled and set aside, in a proper proceeding therefor.

SAME.—*Review of Judgment.*—An action to annul and set aside a judgment is not a proceeding to review the same.

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SAME.—Jurisdiction of Party.—How Acquired.—Jurisdiction of a party to a civil action can only be acquired, either by the due service upon him of a summons, or by his voluntary appearance.

SAME.—Pleading.—Will.—Widow.—Decedents' Estates.—The defendant, in an action wherein a divorce was granted to the plaintiff, after the death of the latter, testate, filed a complaint against his heirs and devisees, alleging that she had had no notice of such action, that no summons had been issued for or served upon her, that she had not appeared to the action, and that the only service of summons upon or appearance by her, pretended by the plaintiff, was the filing by him, with his complaint, of a paper purporting to be signed by her, waiving the issue and service of summons; and she asked that such judgment be annulled and set aside, that she be permitted to contest the validity of the testator's will, and that she be recognized as his widow.

Held, on demurrer, that, by the averments of the complaint, such court had no jurisdiction of the defendant in such action, that the proceedings subsequent to the filing of the complaint therein were void, and that the complaint in this action is sufficient.

From the Tippecanoe Circuit Court.

W. D. Wallace and *A. Rice*, for appellant.

G. O. Behm, *J. Park* and *A. O. Behm*, for appellees.

NIBLACK, J.—This was a proceeding in the court below by Frederika Willman, against Mary Willman, George Willman, Walburga Willman, Reinhard Willman and Louis Kimmel, to have what purports to be a judgment of that court divorcing her from John Willman, her late husband, since deceased, annulled, set aside and declared void, and to be admitted and recognized as the widow of said John Willman. Also, to be permitted to contest the execution of the last will and testament of the said deceased, and to share his estate.

The complaint was in two paragraphs.

A demurrer was sustained to both paragraphs, and there was judgment, on demurrer, for the defendants.

The sufficiency of the complaint, therefore, is the only question presented to us here.

It is alleged in both paragraphs of the complaint, among other things, but in a somewhat different form in each, in substance, that the appellant was, on the 2d day

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of August, A. D. 1865, united in marriage with the said John Willman, and that he and she, from that time, lived and cohabited together as husband and wife, until a short time before his death, a period of more than nine years, during which time four children were born to them as the fruit of such marriage, of whom the said Mary Willman and George Willman, two of said children, are the only survivors.

That on the 11th day of May, A. D. 1875, while she, the appellant, was still living with him as his wife, in the city of Lafayette, in this State, he, the said John Willman, without her knowledge or consent, commenced an action for a divorce, against her, in the Tippecanoe Circuit Court, and caused to be filed with his complaint a waiver, in writing, signed by her, of the issuing and service of process in the action, as follows:

"The State of Indiana, Tippecanoe County, ss:

"In the Tippecanoe Civil Circuit Court, April term, 1875.

"John Willman v. Frederika Willman.—Divorce.

"The undersigned, Frederika Willman, the defendant in the above entitled suit, hereby waives the issuing and service on her of process in the above entitled suit, and consents that said cause shall stand for trial at said term of said court.

(Signed,)

"FREDERIKA WILLMAN."

"Witness: RICHARD ROTTLE."

That, on proof of the execution of said writing, the court entered a default against her, and, in her absence and without any appearance by her to the action, either in person or by attorney, proceeded to hear evidence, and entered a judgment of divorce against her.

The said John Willman died about a month after these divorce proceedings were concluded. Previous to his death, he executed an instrument, in writing, purporting to be his last will and testament, in which he made but a nominal provision for the said Frederika Willman, leav-

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ing the rest of his property, amounting in value to perhaps eight or nine thousand dollars, to his two surviving children, above named, and to the said Walburga Willman, his mother, and to the said Reinhard Willman, his brother. Kimmel is the administrator of his estate with the will annexed.

The only questions discussed in this court by counsel on both sides arise out of and upon the alleged proceedings in divorce, referred to in the complaint.

It is a well settled rule of law, that there can be no proceedings to review a judgment of divorce. 2 R. 3. 1876, p. 247, sec. 586; *McJunkin v. McJunkin*, 3 Ind. 30; *Woolley v. Woolley*, 12 Ind. 663; *McQuigg v. McQuigg*, 13 Ind. 294; *Wiley v. Pratt*, 23 Ind. 628; *Ewing v. Ewing*, 24 Ind. 468; *Shoemaker v. The Board, etc.*, 36 Ind. 176; *McFarland v. McFarland*, 40 Ind. 458; *Hornaday v. The State*, 43 Ind. 306; *Sullivan v. Learned*, 49 Ind. 252.

That rule, however, as we construe it, has only a practical application to cases in which there has been a valid and effective judgment of divorce, and does not prohibit proper proceedings, by a party interested, to annul and set aside a so-called judgment of divorce, which is void either for want of jurisdiction over the subject-matter, or of jurisdiction of the parties.

Properly considered, a proceeding to review a judgment presupposes the existence of a valid and subsisting judgment, which may, on the hearing, be affirmed, reversed or modified, either in whole or in part, as the justice of the case may require, and is prosecuted on the theory that there is such a valid and subsisting judgment which ought to be reversed or modified. An action to annul and set aside a void judgment, although it may have the form and similitude of a proceeding for the review of the judgment, is, nevertheless, not such a proceeding, in strictly legal contemplation. It is proper to observe this distinction in the consideration of such cases as the one before us.

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In an ordinary adversary proceeding against a resident of this State, jurisdiction over the person of the defendant can only be acquired in two ways.

1st. By the issuing and service of a summons; and,

2d. By a voluntary appearance in court, and a submission to its jurisdiction.

This subject was fully considered and ruled upon by this court, in the case of *McCormack v. The First National Bank of Greensburgh*, 53 Ind. 466, and need not, we trust, be further elaborated here.

In regard to the divorce proceeding, against which the appellant seeks to be relieved, it is made affirmatively to appear, that no summons was issued for or served upon her, and that there was no voluntary appearance by her to the action. Consequently, neither one of the modes provided for by statute was resorted to for the purpose of obtaining jurisdiction over the person of the appellant.

The paper filed in that proceeding by the plaintiff, by which the defendant agreed to waive the issuing and service of process on her in that action, did not supply the place of a summons. Neither did it constitute an appearance to the action. As a means of obtaining jurisdiction over the person of the defendant in that proceeding, it was invalid and ineffectual.

Upon the facts alleged in the complaint, we are of the opinion, that all of the proceedings in the divorce suit, subsequent to the filing of the complaint, were without jurisdiction, and, hence, inoperative and void.

We think both paragraphs of the complaint contained facts sufficient to entitle the appellant to relief against the alleged proceedings in divorce, and that therefore the court erred in sustaining the demurrers to the complaint.

The judgment is reversed, at the costs of the estate of the said John Willman, and the cause remanded for further proceedings in accordance with this opinion.

THE EVANSVILLE AND CRAWFORDSVILLE R. R. CO. v. MARSH.

RAILROAD.—*Freight.*—*Connecting Roads.*—*Pooling Contract.*—*Tender.*—

Where, pursuant to an agreement between connecting railroads, freight is received by one, to be delivered at a point on the other for a sum less than the aggregate regular charges of both, the latter, upon receiving such freight, must deliver it, at such point, to the consignee, upon his tendering such sum to the proper agent of the latter.

SAME.—Where no such agreement exists, and freight is received by one of such railroads, to be delivered at a point on the other for a sum less than the aggregate regular charges of both, the latter company, on receiving it and carrying it to such point, must deliver it to the consignee, upon his tendering such sum, provided it equal the regular charges of the latter, whether it does or does not include any charges for the former.

SAME.—*Replevin.*—If, in either of such cases, such tender be refused, the consignee may replevy such freight.

SAME.—*Tender must be brought into Court.*—Where, to maintain an action, a tender of money must be first made by the plaintiff, such tender must be kept good by bringing it into court.

From the Vanderburgh Circuit Court.

A. Iglehart and J. E. Iglehart, for appellant.

C. E. Marsh, for appellee.

PERKINS, J.—*Replevin* for a horse.

Answer in denial of the complaint; trial by jury; verdict for plaintiff; and, over a motion for a new trial, judgment on the verdict.

The case is this:

In October, 1874, James C. Marsh shipped a horse from Vinton, Iowa, to Evansville, Indiana. The shipment was made by The Burlington, Cedar Rapids and Minnesota Railway, to Chicago, at the agreed rate of freight, to that point, of seventeen dollars and sixty cents, and for the sum of twenty-four dollars and sixty cents to Evansville, thus leaving seven dollars as the freight from Chicago to Evansville, while the regular charge for freight from Chicago to Evansville was fourteen dollars.

On the way-bill of The Burlington, Cedar Rapids, etc., Railway Company, to Chicago, was written, "Horse des-

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tined to Evansville, Indiana; through rate, Vinton to Evansville, \$24.60, charges for feed and water additional." The shipper supplied the feed at Vinton for the entire distance, and no question arises as to that. The horse arrived at Evansville. The agent of the owner called for him at the proper place, and tendered the twenty-four dollars and sixty cents; the tender was refused, and the sum of thirty-one dollars and sixty cents, the aggregate of the regular freights on the two roads (fourteen dollars and seventeen dollars and sixty cents) demanded. The Evansville company denied the power of the agent of The Burlington, etc., R. W. Co. to contract for a through rate of freight, giving the Evansville road less than full freight, and denied any connection or arrangement with that company authorizing such contract. There was testimony on the point. It left the matter in doubt.

The court instructed the jury, that the freight was a lien, but, when the amount due was tendered, the owner was entitled to his property.

"Defendant's counsel then asked the court to instruct the jury, that 'the contract offered in evidence is not the contract of the defendant; and unless some authority to make that contract is shown on behalf of the plaintiff, the jury should find for the defendant.'" But the court refused to give said instruction, whereupon the defendant at the time excepted; and the court proceeded: "That there may be no mistake about that, I will say that that is substantially what I have instructed upon. I leave it for you, Gentlemen of the Jury, to say, from the evidence, whether this was a contract to carry freight the whole distance, at the agreed price of twenty-four dollars and sixty cents. If it was, the tender of that amount was all that Mr. Marsh was bound to do, for the delivery of his property here. And if there was no connection whatever between these roads, and the horse was delivered by the other company to this company, the defendants would be properly entitled to their usual rates of freight. But, if that

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amount or more had been tendered, the defendants would be entitled to nothing but what the contract called for, if the contract called for as much as was due the defendants as freight money;" to the giving of which instruction the defendants excepted.

This freight question seems to us to be within a narrow compass. If there was a connection or agreement between the two roads mentioned, by which the contract in question for through freight was authorized, then the Evansville company was bound by it, and was liable to deliver the horse, on the tender of the amount of freight (twenty-four dollars and sixty cents) stipulated for in the contract. If there was no such connection between the companies, and the agent who made the contract at Vinton, Iowa, had no power to bind the Evansville company by that contract, then the Evansville company had a right to collect her own freight, and was not bound to collect that of the other company. She might receive the amount tendered in discharge of the freight, and if it only equalled her own charge, she might retain the whole of it. If it exceeded that charge, she would account to the other company for the overplus. The Iowa company had agreed to ship the horse in question to Evansville for a given sum of money. That company thereby assumed the burden of satisfying the charges of the roads over which she should ship the horse; and if it took the whole amount she charges for the entire route, she would have to pay it, if it left nothing for her own company. We see no error in the instruction of the court on this point.

The remaining question relates to the tender. It is claimed by the appellant, that, to enable the plaintiff to recover, he should have kept up the tender by payment of the money into court. By the instruction of the court, the jury were led to believe this was not necessary.

Where a defendant is sued for a debt, and pleads a tender, he must follow it up by a payment of the money into court. Bicknell Prac. 190, 191. See 2 R. S. 1876, p.

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362, form No. 23; *The State v. Briggs*, 65 N.C. 159; *Bronson v. The Chicago, etc., R. R. Co.*, 40 How. Pr. 48.

But here is not a plea or answer of tender by a defendant, but a suit by a plaintiff to recover an article of personal property, of which he alleges, in his complaint, he is the owner and entitled to the possession. The general denial is answered, which puts the right of possession in issue. If the plaintiff had brought his suit without tendering the amount of the defendant's lien upon the property, he must have failed. But, having made the tender, can he maintain his suit and recover possession of the property, without paying the amount of the lien tendered into court, is the question.

It seems to us, that he can not. If he can, he may recover his property without paying the freight, leaving the company to a personal remedy against the owner, who may, as is the fact in this case, be and reside in a distant state.

In *Coombs v. Carr*, 55 Ind. 303, it is said, that, in cases "where the court can decree the amount due, and make it a lien on the land, it is not necessary to make a tender before the commencement of the suit, nor bring the money into court; it is sufficient to make the offer in the pleading to pay the amount when it is ascertained. *Seller v. Lingerman*, 24 Ind. 264; *Hunter v. Bales*, 24 Ind. 299; *Turner v. Parry*, 27 Ind. 163; *Kemp v. Mitchell*, 36 Ind. 249; *Lynch v. Jennings*, 43 Ind. 276; *Ruckle v. Barbour*, 48 Ind. 274."

There was a failure of proof under the general denial. The motion for a new trial should have prevailed.

The judgment is reversed, with costs, and the cause is remanded.

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REAGAN ET AL. v. HADLEY.

MORTGAGE.—Release of Procured by Fraud.—Foreclosure against Subsequent Purchaser.—Pleading.—Complaint.—In an action by the holder of a mortgage on real estate, to foreclose it against the mortgagor and the owner, by purchase from the mortgagor, of the equity of redemption, the complaint alleged, that, prior to the conveyance of such equity, the plaintiff had been induced to execute a release of his mortgage, by the false and fraudulent representations of the mortgagor, that he had negotiated with a third person for a loan on such land, with which to pay the plaintiff's debt, but that, to secure such loan, plaintiff must release his mortgage, so that the mortgagor could execute a first mortgage to such third person for such loan, with which he promised at once to pay the plaintiff's debt; that the mortgagor had never made any such negotiation; and that, on the release of such mortgage, he had conveyed such land to his codefendant, who yet owed the purchase-money therefor.

Held, on demurrer, that fraud in the mortgagor is sufficiently charged, and that the complaint is sufficient as to both defendants.

SAME.—Answer.—Parties.—Pleading Struck Out.—Promissory Note.—Where, by a simple answer to the complaint in such action, the defendant owner of the equity of redemption admits the purchase of such land for a certain sum, and alleges that he had executed to the mortgagor his promissory note therefor, and that the same had been sold and assigned to a certain person, without notice of such mortgage, it was not error to strike out of such answer a prayer, that such assignee be made a party to the action to answer as to his interest.

SAME.—Reply.—A reply to such answer, alleging the same facts as those set out in the complaint, and averring that such conveyance had been made by the mortgagor to his codefendant with the full knowledge by the latter of such fraud, is sufficient on demurrer.

SAME.—Consideration for Assignment.—A reply to such answer, alleging that such promissory note had been assigned to a person who received it without giving any new consideration therefor, but simply in discharge of an existing debt then due from the mortgagor to the assignee, is insufficient.

SAME.—Instruction to Jury.—Rights and Liabilities of Subsequent Purchaser.—Estoppel.—Notice.—Former Adjudication.—The court, in such cause, instructed the jury, that, if the mortgagor had not committed the fraud alleged, the owner of the equity of redemption was not liable to the plaintiff; that if he had committed such fraud, but the owner of the equity, without knowledge thereof and before the assignment of such note, had induced the assignee to take such assignment by assuring him that he had no defence thereto and would pay him at maturity, then he was estopped from asserting any defence as against the assignee, and was not

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liable to the plaintiff; but that, if he had given the assignee no such assurances before such assignment, he was liable for the amount of such note to the plaintiff, notwithstanding the good faith of himself and the assignee, and notwithstanding any thing occurring after the assignment; and that such recovery by the plaintiff would be a good defence to an action against him on such note by the assignee.

Held, that the instruction was right.

PRACTICE.—*Harmless Error.*—*Pleading.*—*Supreme Court.*—Where a demurrer is improperly overruled to an insufficient pleading, but all the evidence admitted thereunder on the trial was properly admissible under other pleadings, such error is not available on appeal to the Supreme Court.

SAME.—*Instruction to Jury.*—*New Trial.*—*Assignment of Error.*—Error in giving or refusing instructions to the jury is proper ground for a new trial, but can not be assigned as error on appeal to the Supreme Court.

From the Morgan Circuit Court.

W. R. Harrison and W. S. Shirley, for appellants.

S. K. Harryman, G. W. Grubbs and M. H. Parks, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellants, as defendants, in the court below.

Appellee's complaint was in three paragraphs, and issues of law and fact were formed on each of these paragraphs; but, before the final submission of the cause to the jury, the appellee virtually abandoned the first and third paragraphs of his complaint, and the jury were so instructed by the court below.

In our examination of this cause, therefore, we will consider the second paragraph of appellee's complaint alone, as if it were in fact, what it is in effect, the only complaint in the action.

In the second paragraph of his complaint, the appellee alleged, in substance, that on the 23d day of May, 1865, he sold to the appellant Sylvester Johnson and one Robert Johnson, who were brothers and partners in business, certain land hereinafter described; that, in part consideration for said land, the said Sylvester and Robert Johnson executed their promissory note of that date for two thousand dollars, a copy of which note was filed with said paragraph as a part thereof, which said note was

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made payable six years and six months after date, with interest thereon from December 25th, 1865, without relief from valuation or appraisement laws; that, to secure the payment of said note, the appellants Sylvester and Mary B. Johnson and said Robert Johnson executed to appellee a mortgage on said real estate, a copy of which mortgage was filed with said paragraph as a part thereof; that afterward said Robert Johnson conveyed his right, title and interest in and to said land to said Sylvester Johnson, who assumed and undertook the payment of said debt; that afterward, on the — day of —, 187—, appellant Sylvester Johnson, intending and contriving to cheat and defraud the appellee, falsely represented to appellee, that he, said Sylvester Johnson, wanted, and was arranging, to negotiate a loan with a certain insurance company, for the purpose of procuring money with which to pay off and discharge appellee's debt, and that he had so far arranged to negotiate said loan as that all that remained to enable him to consummate said arrangement, and negotiate said loan, was, that the appellee should release said mortgage on said land, so that he might thereby mortgage it for said loan, and that he could only procure said loan by appellee's releasing his said mortgage, and said Sylvester Johnson thereupon agreed and pledged himself, that, if appellee would make and execute such a release, he would and could thereby procure said loan, and would, with the money so procured, immediately pay off and discharge appellee's said debt; that appellee, relying upon said fraudulent representations, and believing that said Sylvester so intended to negotiate said loan, and to pay him his debt, which had then been long due, made and executed a release of said mortgage, and recited therein that said debt was paid and satisfied, and did so for the purpose aforesaid and none other, and was induced thereto by said representations and none other; that the appellant Sylvester Johnson was not then intending nor attempting to negotiate a loan with any insurance com-

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pany, and had not made any arrangement for such purpose, and was not intending thereby to procure money to pay off appellee's said debt; but that, having so procured said release to be executed, he, said Sylvester, thereupon, in violation and utter disregard of his promise, and in fraud of appellee's rights, sold the said land to the appellant — Reagan, who agreed to pay him therefor the sum of ——— dollars, and executed his promissory notes therefor; that there was still unpaid and owing, upon said notes, by said Reagan, the sum of two thousand five hundred dollars, and that appellee's said note, except the sum of one thousand dollars paid thereon, was due and unpaid, to appellee's damage in the sum of two thousand dollars. Wherefore appellee demanded judgment against said Sylvester for two thousand dollars, that said mortgage be foreclosed to the extent of the amount of money yet due from said Reagan upon said land, or to the extent of appellee's claim, and for all other proper relief.

The copies of the note and mortgage, which were made parts of said paragraph of complaint, were filed therewith and are set out in the record.

The appellants Johnson and wife, and the appellants, the Reagans, severing in their defence, demurred to the second paragraph of appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrers were severally overruled by the court below, and to these decisions the appellants severally excepted.

And the appellants Jesse and John W. Reagan, severing in their defence, for answer to the second paragraph of appellee's complaint, said, in substance, admitting the execution of the note and mortgage as therein averred, that it was true, as therein set forth, that appellee, on the 8th day of April, 1872, and again on the 11th day of April, 1873, executed and delivered to said Sylvester Johnson acknowledgments of satisfaction, and releases, of said mortgage, duly acknowledged, and the same were

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duly entered of record with and upon said mortgage, copies of which releases were filed with said answer; and said appellants, the Reagans, further averred, that said Sylvester Johnson, immediately after the execution and record of said releases, procured a loan of two thousand five hundred dollars of The North-Western Mutual Insurance Company, and executed a mortgage therefor to said company upon the lands set out in said mortgage to the appellee, and before the execution of said release had negotiated said loan of said company; that on the 12th day of April, 1873, said Sylvester Johnson, by a warranty deed, conveyed said lands to the said Reagans, subject to said mortgage to said company, for six thousand dollars, which sum said Reagans paid to said Sylvester, except the sum of two thousand dollars, for which they executed notes to said Sylvester in instalments of five hundred dollars, which notes said Sylvester immediately assigned and transferred for value, as follows: one note to Charles W. Ballard and William A. Poe, who transferred the same for value to Samuel M. Mitchell, who then owned and held the same; and the other three of said notes said Sylvester transferred and endorsed, for value, to Leander Johnson, who, for value, immediately transferred the same to John C. Burton & Co., who then owned and held the same, which transfers and assignments of said notes were made, and said notes delivered, to the then holders thereof, before the said Reagans had any notice that appellee had or held any claim on said land, or that his said mortgage had not been fully paid and satisfied; and that the said Reagans had been notified of the said assignments of their said notes to the said holders thereof, long before the said Reagans had any notice that the appellee's mortgage was not paid; that before said note was transferred to said Ballard and Poe by said Sylvester Johnson, the said Reagans, without any knowledge or notice of any of the fraud or matters set up in appellee's complaint,

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undertook and promised said Ballard and Poe, that said Reagans had no defence to said note, and would pay the same to said Ballard and Poe, according to its tenor and effect, nor had said Ballard and Poe, or Mitchell, any notice of any of the fraud or matters set up by appellee in his complaint, when said note was so assigned. And the said Reagans denied all fraud charged in said complaint, and denied that they then were, or were when this suit was commenced, indebted to said Sylvester Johnson in any sum for said land. Wherefore the said Reagans said, that the appellee was estopped from foreclosing said mortgage, etc.

To this answer of the appellants Jesse and John W. Reagan, the appellee replied in three paragraphs, as follows:

1. A general denial
2. Appellee admitted the execution of the release of the mortgage set out in said answer, and dated April 8th, 1872, but alleged, that said release was procured by the fraud of said Sylvester Johnson, as averred in the complaint. Appellee also admitted the execution of the further release of said mortgage, dated April 11th, 1873, and set out in said answer, but alleged, that said release was procured by the fraud and deceit of said Sylvester Johnson, in the manner following, to wit: That on said April 11th, 1873, said Sylvester Johnson, contriving and intending to cheat and defraud appellee, falsely represented to appellee, that he, said Sylvester, had arranged to procure a loan with a certain insurance company, with which to pay off and discharge appellee's debt, and that all that remained to enable him to consummate said loan was, that the appellee should release said mortgage on said land; that the release theretofore executed by appellee had never been recorded, and had been theretofore lost and destroyed, and said loan of said money had never been procured or received by him, and said mortgage yet remained, and was, unsatisfied of record, and that he could

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only procure said loan by appellee's releasing his said mortgage; and that he thereupon agreed and pledged himself, that, if appellee would make and execute said release of said mortgage, he could and would thereby procure said loan, and wholly pay off and discharge appellee's said debt; that appellee relied upon said false and fraudulent representations, and thereupon made and executed said release of said mortgage, and recited therein, that said debt was paid and satisfied; that he did so for the purpose aforesaid, and none other, and was induced thereto by said representations, and by none other; and appellee alleged, that said Sylvester Johnson was not then arranging, and had not then made any arrangement, to procure or negotiate any loan from any insurance company, and was not intending thereby to procure any money, wherewith to pay off appellee's said debt, but that he had theretofore contracted to sell and convey said lands so mortgaged to his codefendant Reagan, to whom he afterward, in pursuance of said contract, sold and conveyed the same, who took and accepted said conveyance with full knowledge of all the facts, and of said representations. Wherefore, etc.

3. And for a further reply to said answer, and to so much thereof as alleged the assignment of the notes evidencing the balance of unpaid purchase-money, appellee said, that he admitted said notes were assigned, but that said assignees took them voluntarily and without consideration passing at the time, but in discharge and payment of a debt or debts theretofore contracted and then unpaid. Wherefore, etc.

And the appellants demurred separately and severally to the second and third paragraphs of said reply, for an alleged want of sufficient facts therein to constitute a reply to appellants' said answer, which demurrer was overruled, and to this decision the appellants excepted.

The action was tried by a jury in the court below, and a verdict was returned, finding for the appellee and against

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the appellant Sylvester Johnson, and assessing appellee's damages in the sum of two thousand and thirty-three dollars and fifty-three cents, and finding against the appellants "Jesse Reagan and John W. Reagan, for three notes in the hands of J. C. Burton & Co., for five hundred dollars each."

The appellants Jesse and John W. Reagan moved the court below, on written causes filed, for a new trial, which motion was overruled, and said appellants excepted. And a judgment was then rendered upon the verdict, from which judgment this appeal is here prosecuted.

In this court, the appellants have assigned the following alleged errors of the court below:

1st. In overruling the appellants' demurrers to the second paragraph of appellee's complaint;

2d. In sustaining appellee's motion to strike out a part of the appellants', the Reagans', answer;

3d. In overruling the appellants', the Reagans', demurrers to the second and third paragraphs of appellee's reply;

4th. In misdirecting the jury, in and by instructions given, numbered 1, 2, 3, 4, 5 and 6, and each of them;

5th. In refusing to instruct the jury as asked in writing by the appellants, and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and each of them;

6th. In overruling appellants' motion for a new trial; and,

7th. In rendering judgment against the appellants, as to the three notes held by Burton & Co.

We will consider and decide the various questions presented by these alleged errors, in the order in which the errors, if they exist, were committed by the court below.

The appellants, not alone the Reagans, but also the Johnsons, earnestly insist that the second paragraph of appellee's complaint "was bad on demurrer, would be bad, because not setting forth facts sufficient to constitute

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a cause of action, under the statute, without demurrer, and that, for both reasons, the court below erred in overruling the demurrer to it."

Our view of this second paragraph differs, *toto cælo*, from that thus expressed by appellants' counsel. If the facts alleged in this second paragraph were true as stated, and the appellants' demurrers concede them to be true, and if such facts were not controlled or modified by other intervening equities, in our opinion, the appellee would be clearly entitled to all the relief asked for in his said second paragraph. The question presented by appellants' demurrers is one that must be determined upon the facts stated in the paragraph demurred to; and it will not do to argue that the paragraph is bad on demurrer, because "the rights of innocent parties had become involved in the matter," when it does not appear from any averment in the paragraph, that there were any innocent parties. It is insisted by appellants' counsel, that the fraudulent representations of the appellant Sylvester Johnson, as stated by appellee in the second paragraph of his complaint, consisted only in Johnson's promise to pay his debt to appellee in the future. We think that counsel misapprehend the force and effect of the averments in this paragraph of the complaint. We recognize the doctrine that a mere promise to pay a debt in the future, however false and fraudulent it may be in fact, is not in law a representation upon which fraud can be predicated, with a view to the rescission of a contract or the recovery of damages. "Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and not a mere promise to do something afterwards." That is the law of this State, as the same has been stated by this court in a number of cases. *Fouty v. Fouty*, 84 Ind. 433. See, also, *Adkins v. Adkins*, 48 Ind. 12.

But, in the case at bar, the false representations of said Sylvester Johnson, upon which the charge of fraud was

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predicated, related not only to his promise to pay appellee's debt, but also to the fact alleged by him to exist, that he had an arrangement with a certain insurance company for a loan of money, wherewith to pay appellee's debt, and all that remained to enable him to consummate said arrangement and negotiate said loan was, that appellee should release his said mortgage on said land, so that he, Johnson, could mortgage said land to said company to secure said loan.

In our opinion, the facts stated in the second paragraph of appellee's complaint were sufficient to constitute a cause of action against each and all of the appellants, and their demurrers thereto were correctly overruled.

The second alleged error, assigned by the appellants, calls in question the decision of the court below, in sustaining the appellee's motion to strike out a part of the appellants' answer. Appellee's motion, the decision of the court thereon, and the part of the answer which was so struck out were made part of the record by a proper bill of exceptions. The part of the answer so struck out was in these words: "And they especially pray that said Samuel M. Mitchell and said John C. Burton & Co., which firm is composed of the following persons, to wit: John C. Burton, William A. Pfaff and John W. Pfaff, be made parties herein, that the ultimate rights of said plaintiff, and said Mitchell, and said John C. Burton & Co. to the residue of the purchase-money of said land may be determined."

It will be observed, that the language just recited was a part of the answer of the appellants Jesse and John W. Reagan to appellee's complaint. The appellants, the Reagans, had filed no counter-claim nor cross-complaint in this action; nor were they seeking any affirmative relief against any of the parties to the action. The only pleading filed by said appellants in response to the second paragraph of the appellee's complaint was denominated by them, and was in fact, an "answer to the second paragraph

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of said complaint." In such a pleading, it seems to us, that the language above recited was wholly out of place. It was neither matter of defence, counter-claim, nor set-off. It was mere surplusage in said answer, and was properly struck out by the court below, on appellee's motion. It does not appear from the record, that Mitchell or any member of the firm of John C. Burton & Co. made any application to the court below to be made parties to this action. Nor does it appear from any showing made in the court below, or apparent in the record, that a complete determination of the controversy in this action, could not be had without the presence of either Mitchell or the members of the firm of John C. Burton & Co., as parties to the action; and, in such a case, they were not necessary parties to the suit. Our conclusion is, that the court below committed no error in sustaining appellee's motion to strike out the said part, before recited, of said answer.

The third alleged error of the court below, complained of by the appellants, was its decision in overruling their demurrers to the second and third paragraphs of appellee's reply.

The ruling of the court below upon the second paragraph of the reply, and the assignment of such ruling as error, present substantially the same questions for our consideration as those we have already considered and decided, in passing upon the sufficiency of the facts stated in the second paragraph of appellee's complaint to constitute a cause of action. We need not consider those questions further, but, for the reasons there given, we hold, that no error was committed by the court below in overruling appellants' demurrer to the second paragraph of appellee's reply.

The third paragraph of the reply was applicable, by its terms, to so much of the appellants' answer as alleged that the notes given by the Reagans for the unpaid balance of the purchase-money had been assigned by said

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Sylvester Johnson, and notice of such assignment given to said Reagans, before they had notice that appellee's mortgage had not been fully paid and satisfied, or that the appellee had or held any claim on said land. In reply, particularly to this part of appellants' answer, the appellee said, that he admitted, that said notes were assigned, but alleged, that said assignees took them voluntarily, and without consideration passing at the time, but in discharge and payment of a debt or debts theretofore contracted and then unpaid.

It is reasonably certain, we think, that the court below erred in overruling appellants' demurrer to this third paragraph of appellee's reply; but it is equally true, in our opinion, that the error was an entirely harmless one. The evidence adduced upon the trial, in the court below, is properly in the record, and it clearly appears, from a close and thorough examination of this evidence, that no evidence was offered or admitted on the trial which was not admissible under the other pleadings in the action. This court has repeatedly held, that it would not reverse a judgment for an erroneous decision, where it clearly appeared, from the entire record, that the party complaining of such decision was not injured thereby. *The Indianapolis, etc., R. R. Co. v. Smythe*, 45 Ind. 822; *The Evansville, etc., R. R. Co. v. Baum*, 26 Ind. 70; and *Buskirk* Prac. 284.

The fourth and fifth alleged errors, assigned by appellants, are both proper causes for a new trial, in a motion therefor addressed to the court below. If not assigned as causes for a new trial, in appellants' motion therefor, their assignment as errors in this court would present no question for our consideration. And when they are assigned as causes for a new trial in the court below, the only error properly assignable in this court is the overruling of the motion for such new trial.

The overruling of their motion for a new trial, by the court below, is the sixth alleged error complained of by

the appellants in this court. Several causes for such new trial were assigned by the appellants, in their motion therefor, but we will consider only such of these causes as appellants' counsel have discussed in their argument of this case in this court, deeming the others as virtually waived.

It is insisted by counsel, that the court below erred, in giving to the jury, of its own motion, instructions numbered 3 and 4. These instructions were as follows:

"3. Under these issues and the admissions of the parties, the questions you are to decide are,

"1st. Did Johnson fraudulently procure the release of the mortgage?

"4. If you find he did not, then that will be the end of the case against the Reagans, and you could only find against Johnson the amount of the plaintiff's note.

"But if you find, that Johnson did procure the release of the mortgage by fraud, then the next question for you to decide is, did the Reagans, before they had notice of the fraud, and before their notes were sold and transferred by Johnson, induce the purchasers thereof to buy the same?"

We are much at a loss to understand, from the argument of appellants' counsel, the nature and force of their objections to these two instructions of the court to the jury. Apparently, these instructions were framed by the court upon the pleadings, to inform the jury, in succinct and clear terms, of the exact questions which the parties had submitted to them for trial, and which they must decide.

We think that these questions were fairly stated to the jury by the court in the two instructions complained of, and it would seem, from the comments of counsel thereon, that they complained of these instructions, not because of any error in them, but because they were apparently introductory to another instruction, which, they

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insist, was erroneous. This other instruction was as follows:

"6. If you find that Johnson committed a fraud in procuring the release of the mortgage, then your next inquiry is, did the Reagans, before they had notice of the fraud, and before Johnson had parted with their notes to Burton & Co., tell Burton & Co., that they had no defence to their notes, and that they would be paid at maturity?"

"If you find both of these facts in the affirmative, then the Reagans have innocently estopped themselves from defending against the notes in the hands of Burton & Co., and the money can not be reached by the plaintiff, and you must find for the Reagans. But if you find no representations, promises or inducements were made to Burton & Co., by the Reagans, before Burton & Co. purchased the notes from Johnson, no matter what was done after Burton & Co. had purchased the notes, then the Reagans have not estopped themselves from defending against the payment of said notes to Burton & Co., should they be required to pay the same to plaintiff; and, in that event, plaintiff has a right to have the money, when due, paid upon his debt, although it may have been shown that the notes held by John C. Burton & Co. were in good faith transferred to, and received by, them, before they or the Reagans had received notice of any fraud on the part of Johnson in procuring the release of the mortgage from plaintiff."

We have set out this instruction in full, because in it will be found, we think, a clear exposition of the precise questions at issue in this action between the appellants, the Reagans, and the appellee.

It would seem from the record, that Johnson virtually confessed the gross fraud wherewith he was charged by appellee, in the second paragraph of his complaint; for, although Johnson appeared in the action and was represented therein by the able attorneys of the Reagans, yet apparently it was not deemed advisable or necessary that

any answer, not even a general denial, should be pleaded in his name or behalf, to the second paragraph of appellee's complaint.

The Reagans answered this paragraph of the complaint, however, and the gist of their defence was, as to the unpaid balance of the purchase-money for the land, that before they had any notice of Johnson's fraud in procuring the release of appellee's mortgage, or of the fact that appellee asserted any claim against said land, their notes for said purchase-money had been assigned by said Johnson, for value, to innocent parties, without notice of fraud, and were then held by the assignees thereof, under such circumstances that they, the Reagans, as the makers of said notes, would be estopped from making any defence to said notes, in the hands of the said holders thereof.

This defence, and the issues joined thereon, made it the duty of the court below to instruct the jury trying the cause upon the doctrine of estoppel, as the same was applicable to the facts of this case, as stated in the pleadings and shown by the evidence.

In our opinion, this instruction number 6 contains a full and fair statement of the law of this State on the subject of estoppel, as applicable to the case made by the pleadings and evidence in this cause.

It has been repeatedly held by this court, that the declarations or representations of the maker of a note, made to the assignee of such note after his purchase thereof, and which did not induce the assignee to make such purchase, will not estop such maker from setting up any defence, legal or equitable, he may have to such note, in the hands of such assignee. *Jones v. Dorr*, 19 Ind. 384; *Ray v. McMurtry*, 20 Ind. 307; *Patrick v. Jones*, 21 Ind. 249; *Stutsman v. Thomas*, 39 Ind. 384.

We have been asked by appellants' counsel to consider, in this connection, the instructions numbered 1, 2, 3, 8 and 9, which the Reagans asked the court below to give,

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but which the court refused to give, to the jury trying the cause, and we have complied with this request.

We need not set out any of these instructions. As abstract propositions, we are inclined to think that but little, if any, fault could be found with either the manner or the matter of any of the instructions asked for by the appellants. The chief objection to these instructions, and the one, we apprehend, which led the court below to refuse to give them to the jury, was, that they were not applicable to the case made by the pleadings and evidence in this action. The instructions asked were, in our opinion, properly refused.

We have carefully examined and considered the entire record of this cause, the alleged errors assigned thereon, and the arguments of counsel in this court, and our conclusion is, that the cause has been fairly tried and correctly decided, that no error was committed by the court below, in overruling the appellants' motion for a new trial, and that the judgment of that court in this action is in strict accordance with law and the equities of the case, and ought not to be disturbed.

The judgment of the court below is affirmed, at the costs of the appellants.

Opinion filed at May term, 1877.

Petition for a rehearing overruled at November term, 1877.

57	524
160	117

GILBERT v. ALLEN.

PARTIES.—Defect of.—Pleading.—Justice of the Peace.—An action commenced before a justice of the peace, on a judgment in favor of the plaintiff and another, against the defendant and another, without any allegation in the complaint as to why the other judgment creditor is not joined as a co-plaintiff, should be dismissed on motion for defect of parties plaintiffs, or a demurrer thereto assigning that reason should be sustained.

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SAME.—*Demurrer.—Plea in Abatement.*—If, in such case, such omitted judgment defendant be living, but that fact does not appear by the complaint, an objection that there is a defect of parties defendants must be presented, not by demurrer, but by a plea in abatement alleging such fact.

SUPREME COURT.—*Unavailable Error.—Judgment.*—Where the complaint in an action is insufficient, a judgment rendered therein for the defendant, on the trial of the cause, will not be reversed by the Supreme Court, on appeal, because of errors committed by the lower court against the plaintiff.

From the Vanderburgh Circuit Court.

A. Dyer, for appellant.

L. Wood, and J. M. Shackelford, for appellee.

PERKINS, J.—Suit commenced before a justice of the peace of Vanderburgh County, Indiana, by Samuel E. Gilbert, upon the following transcript of a judgment rendered in the State of Kentucky. The suit is against Andrew M. Allen.

“Davies Circuit Court, August Term, 1860.

S. E. Gilbert & Co., plffs., v. Brown & Allen, def.
Judgment.

“The defendant having been duly summoned, and failing to answer, it is now adjudged by the court, that plaintiffs recover of defendants the sum of \$395.²²/₁₀₀, with interest thereon from 24th day of January, 1855, until paid, subject to the following credits: \$2.52 paid 5th April, 1855, \$49.06 21st April, 1855, and \$49.04 on 25th Dec., 1855; and that plaintiffs also recover of the defendants the further sum of \$71.36, with interest thereon from 24th day of January, 1855, until paid, subject to a credit of \$42.30, paid 13th February, 1855, and their costs herein expended.

“Davies Circuit Court.

“I, John P. Thompson, clerk of said court, do certify that the foregoing is a true copy of the judgment rendered by said court on the 28th day of August, 1860, in the action mentioned in the caption.

“Given under my hand this 23d April, 1869.

“JOHN P. THOMPSON, Clerk.”

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The certificate of the judge follows.

We omit, as unimportant in this case, the part of the transcript preceding the judgment.

The cause went by appeal to the Vanderburgh Circuit Court.

In that court, the defendant, Allen, moved to dismiss the suit for want of necessary parties, but the motion was overruled, and the defendant excepted.

He then demurred to the complaint, assigning divers causes,—among them, a defect of parties plaintiffs, and a defect of parties defendants,—but the demurrer was overruled, and exception reserved.

An answer was filed. The cause was tried, and the defendant had judgment.

The plaintiff appealed to this court, and assigned errors.

The defendant has assigned as cross-errors, that the court erred in overruling his motion to dismiss the case, and in overruling his demurrer to the complaint.

The court should have sustained the motion to dismiss, the suit having originated before a justice; *Bragg v. Wetzel*, 5 Blackf. 95; and, not having done so, should have sustained the demurrer to the complaint. *Barrackman v. Worthington*, 5 Blackf. 213, is in point.

This suit is prosecuted by Samuel E. Gilbert, upon the transcript of a judgment in favor of S. E. Gilbert & Co., shown incidentally by the record to be a partnership, composed of several persons, against "Brown & Allen," presumed partners under that name, without any allegations in the complaint, in this suit, showing who the plaintiffs or defendants in the Kentucky judgment are, or why they are not all made parties to this suit.

Where the cause of action shows, that the action is brought by a part of the joint contractors, the complaint should show a reason for the omission of the others; but as to the defendants, if the complaint does not show that those omitted are living, it must be made to appear by plea in abatement. *Dillon v. The State Bank*, 6 Blackf.

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5, 7, note 2; *Hubbell v. Skiles*, 16 Ind. 138; *Britton v. Wheeler*, 8 Blackf. 31; *Alexander v. Gaar*, 15 Ind. 89; *Bledsoe v. Irvin*, 35 Ind. 293. See, also, *Pollock v. Dunning*, 54 Ind. 115.

As the court below should have dismissed the cause, or sustained a demurrer to the complaint, and as the result of the trial upon the merits was against the plaintiff, we have not examined the errors assigned by him; for, should we find them to exist, we could not reverse the judgment against him, as he is entitled to no judgment upon his complaint. A right result has been reached, though by erroneous methods.

The judgment is affirmed, with costs.

57	527
167	182

HANRAHAN v. THE STATE.

CRIMINAL LAW.—*Indictment.*—*Billiard Table.*—*Suffering Minors to Congregate.*—*Motion in Arrest.*—An indictment under the act of March 8th, 1873, (2 R. S. 1876, p. 484,) in relation to the keepers of billiard tables, charged, that the defendant, "having the control and management of" a saloon in which billiard tables were kept, suffered and permitted certain minors to congregate in such saloon.

Held, on motion in arrest, that the indictment is insufficient.

From the Carroll Circuit Court.

B. B. Dailey, for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, C. J.—The appellant stands charged by indictment as follows:

"The grand jurors of Carroll county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to inquire into felonies and certain misdemeanors within and for the body of said county of Carroll, do upon their oaths present, that one

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Anthony Hanrahan, late of said county and State, on the 1st day of March, A. D. 1877, at said county and State, and [did?] then and there unlawfully suffer and permit Wilson Barnett and George Black, minors, persons under the age of twenty-one years, to congregate at, in and about his saloon, in which billiard tables were kept, he, the said Anthony Hanrahan, then and there having the control and management of said saloon in which were kept billiard tables; that said billiard tables were not kept or used by a private family; contrary to the statute," etc.

This indictment is founded on the 2d section of the act of March 8th, 1873, (2 R. S. 1876, p. 484,) which is in the following words:

"Sec. 2. That any person owning or having the care, management, or control of any billiard table or tables, bagatelle table or pigeon-hole table kept in any saloon, hotel or other public place who shall suffer or permit minors to congregate at, in and about such place where such billiard table or tables, bagatelle table or pigeon-hole table may be kept, shall, for each offence, be fined in any sum not less than twenty-five dollars, nor to exceed five hundred dollars."

There was a plea of not guilty to the indictment, upon which a trial by jury and a conviction were had, and a fine assessed.

The appellant moved in arrest of judgment, but the court overruled the motion, and rendered judgment against the appellant. Exceptions and appeal.

It is not always necessary to literally follow the words of a statute creating or declaring an offence, but the offence must be substantially stated in the indictment, either in the same or equivalent words. We do not think the words, "having the control and management of said saloon in which were kept billiard tables," as averred in the indictment, are equivalent to the words, "having the care, management, or control of any billiard table," as

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used in the statute Having the control and management of a saloon is clearly different from having the care, management or control of a billiard table, although the table might be within the saloon. The right to control the saloon might be in one person, and the right to control a billiard table in the saloon in another person.

This indictment does not sufficiently state any public offence, and we think the court should have sustained the motion in arrest of judgment. *Mullen v. The State*, 50 Ind. 169; *McGuire v. The State*, 50 Ind. 284; *Laydon v. The State*, 52 Ind. 459, and *Shepherd v. The State*, 54 Ind. 25.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion in arrest of judgment.

CARLISLE v. TENBROOK ET AL.

PARTNERSHIP.—*Contract.*—*Losses.*—*Action for Accounting.*—*Instruction to Jury.*—A. and B. entered into partnership for manufacturing purposes, under an agreement that the former should furnish all capital necessary for the purchase of machinery and material, and for carrying on the partnership business; that the latter should superintend the business; and that all losses should "be borne equally by them." A. purchased certain real estate, taking the title in himself, and erected thereon the necessary buildings and machinery, at his own expense. The machinery having been damaged by fire, and B. having sued A. for an accounting, the court instructed the jury that B. should share equally with A. in such loss.

Held, that the instruction was not erroneous.

From the Parke Circuit Court.

T. N. Rice, J. T. Johnston and A. F. White, for appellant.

S. F. Maxwell, S. D. Puett and D. H. Maxwell, for appellees.

Carlisle v. Tenbrook et al.

WORDEN, J.—The parties to this action entered into the following agreement:

“We, William Tenbrook, W. S. Magill and James Carlisle, have this day entered into copartnership, for the purpose of manufacturing staves and heading, in the town of Rockville, Indiana, under the firm name of William Tenbrook & Company. William Tenbrook and W. S. Magill shall furnish the capital to purchase and put up the machinery, purchase material, and generally to conduct the business. It shall be the duty of James Carlisle to superintend the business, purchase timber, have it delivered in the yard in proper order and in sufficient quantities to keep the machinery running, to employ hands, and superintend, in person, the running of the machinery, and exercise general supervision over all the work pertaining to the business. W. S. Magill shall keep all the accounts, receive all moneys and disburse the same, and generally to perform all the duties of secretary and treasurer; and, further, to render a detailed statement of the business of the company, at least once in twelve months, and oftener if it is desired by either member of the firm.

“Before any division of profits is made, interest shall be paid upon the capital invested at the rate of ten per cent. per annum. James Carlisle shall be paid for his services at the rate of seven hundred and fifty dollars per year; W. S. Magill shall be paid for his services at the rate of two hundred and fifty dollars per year, and William Tenbrook, for any labor he may perform, shall be paid two and $\frac{40}{100}$ dollars per day; after which any remaining profits shall be divided equally between the three parties. If losses shall occur, they shall be borne equally by them. This partnership shall continue for the period of one year from this date, at which time it may be extended by the unanimous consent of the parties.”

This agreement was duly signed by the parties.

This action was brought by Carlisle, against the other

partners, to recover a balance alleged to be due him on the partnership transactions.

Issue; trial by jury; verdict and judgment for the plaintiff for one dollar.

A motion for a new trial was made by the plaintiff, and overruled by the court.

It appears that the business contemplated by the agreement was carried on by the partners in the manner provided for in the agreement, Tenbrook and Magill buying a lot on which to erect the machinery, taking the deed therefor in their own names, and furnishing the capital with which to erect the buildings and machinery, and to carry on the business generally, until the partnership was finally dissolved.

During the continuance of the partnership, however, a fire occurred, doing damage to the machinery and other property owned or used by the firm.

Upon the trial of the cause, the court gave to the jury the following instruction, to which the plaintiff excepted, viz.:

"The plaintiff, by the terms of the articles of copartnership, would be liable, in an accounting between himself and the defendants, for one-third of the loss that resulted to the machinery used in the mill."

The giving of this instruction is all the error complained of by the appellant.

We have seen that it was stipulated in the agreement between the parties, that, if losses should occur, they should be borne equally by the parties, and we are not able to see any good reason why the stipulation should not be held to apply to losses by fire, as well as to losses by bad debts, or otherwise.

But the counsel for the appellant urge, as we understand their brief, that the title to the property injured was in the defendants, and was not partnership property, and, therefore, that the loss thereto should not be regarded as

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a loss within the meaning of the contract. No authorities, however, are cited on the point.

The loss was a loss of so much of the capital invested by the defendants in the business, in pursuance of the terms of the contract, and we can not say, under the unqualified terms of the contract as to losses, that the parties did not thereby contemplate such losses.

We think no error was committed in giving the charge. The judgment below is affirmed, with costs.

57	532
131	555
57	532
135	179
57	532
140	613

GODDARD v. RENNER ET AL.

PARTNERSHIP.—*Real Estate, Alienation of.*—*Conveyance by one Partner.*—A conveyance of real estate, used by and belonging to a copartnership, by a member thereof, passes simply his own interest therein.

SAME.—*Redemption.*—*Execution.*—*Payment.*—Where copartnership real estate, which has been sold on an execution issued on a judgment against the firm, is conveyed by a member of the firm to a grantee who redeems the same from such sale, such redemption is a voluntary payment in which the grantee will not be protected, and such real estate may then be sold on execution for any unsatisfied balance of such judgment.

SAME.—*Estoppel.*—Where, in such case, the purchaser at such sheriff's sale accepts the redemption money from such grantee, his certificate of sale from the sheriff is annulled, and he is estopped from afterward denying such grantee's right to redeem.

From the Shelby Circuit Court.

B. F. Love, J. S. Scobey and O. B. Scobey, for appellant.
J. Schwartz, for appellees.

NIBLACK, J.—This was a proceeding, in the court below, by James Goddard, against Gideon Renner, Adam Kastner, sued by the name of Kistner, and John Hoop, for an injunction.

The complaint represents, that, on the 18th day of January, A. D. 1867, one Charles Schreiber, being the owner of

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lot No. 74, in Fletcher & McCarty's Addition to the town of Shelbyville, and having formed a copartnership with one Charles Vogel, for the purpose of erecting and carrying on a brewery on said lot, conveyed one undivided half thereof to the said Vogel, so as to give him an equal interest in it as a partner in such brewery; that said Vogel and Schreiber, under the firm name of Vogel & Schreiber, erected a brewery on said lot, and carried on therein the business of manufacturing beer, until some time in the year 1868; that, while carrying on said brewery, the said Vogel & Schreiber became indebted to the said Kastner and Renner, who were partners doing business in the firm name of Kastner & Renner, and to divers other persons, in various sums of money; that, on the 2d day of March, 1868, said Kastner & Renner obtained a judgment in the court of common pleas of Shelby county, against said Vogel & Schreiber, for the sum of seven hundred and forty-three dollars and thirteen cents, and costs of suit; that, on the same day, one Alfred Major also obtained a judgment in the same court, against the said Vogel & Schreiber, together with one Philip Sandhinger as their surety, for the sum of three hundred and fifty-two dollars and fifty cents, and costs of suit; that, on the same day, one Samuel Hamilton also obtained a judgment in the same court, against the said Vogel & Schreiber, together with one Henry Hahel, for the sum of five hundred and one dollars and twenty-five cents, and costs of suit; that, on the same day, one Jonathan H. Scudder also obtained a judgment in the same court, against the said Vogel & Schreiber, for the sum of three hundred and seven dollars and seventy-five cents, and costs of suit; that, soon after the rendition of their said judgment, the said Kastner & Renner had an execution issued thereon, and placed in the hands of the sheriff of Shelby county, who levied said execution on said lot No. 74, and who afterward, on the 23d day of May, 1868, after due notice, sold the same to the said Kastner for the sum of seven

Goddard v. Renner *et al.*

hundred dollars, and gave him a certificate of such sale; that, at the time of said sale, the said Vogel & Schreiber were wholly insolvent, and have ever since continued so to be, by reason whereof they were unable to redeem said lot from such sale; that, at the time of said sale, said sheriff had also in his hands executions on all the other judgments, above named, against the property of the said Vogel & Schreiber; that, after paying the costs due on said judgment out of the proceeds of said sale, said sheriff made a *pro rata* distribution of the remainder of such proceeds, on the several executions in his hands, as follows: To the said Kastner & Renner, two hundred and forty-six dollars and ninety-three cents; to the said Major, one hundred and twenty-three dollars and fifty cents; to the said Hamilton, one hundred and seventy-two dollars and eighty-five cents; to the said Scudder, one hundred and nine dollars and twelve cents; that afterward, on the 22d day of May, 1869, the said Schreiber sold, and conveyed by warranty deed, said lot No. 74 to the said James Goddard, the plaintiff below, and thereupon, on the same day, the said Goddard, for the purpose of redeeming said lot from the sale so made by the sheriff to Kastner, as above set forth, paid into the proper clerk's office, for the use of said Kastner, the sum of seven hundred and seventy dollars, being the amount of the purchase-money, with ten per cent. interest thereon to that date, which said sum of money was, on the 4th day of June, 1869, received and receipted for in due form by the said Kastner; that afterward, on the 2d day of July, 1869, the said Kastner & Renner caused another execution to be issued on their said judgment, for the balance still remaining due thereon, and to be placed in the hands of the defendant Hoop, who was then sheriff of Shelby county; that the said Hoop, as such sheriff, soon thereafter proceeded to levy again on said lot No. 74, and to advertise the same for sale to satisfy the balance still remaining due on said judgment as aforesaid. Wherefore the plaintiff prayed

for an injunction against the defendants, restraining them from again selling said lot, and for other proper relief.

A demurrer for want of sufficient facts was sustained to the complaint, and there was judgment on the demurrer.

The only question we have to consider, therefore, is the sufficiency of the complaint.

It is claimed by the appellant, that, as Vogel and Schreiber were partners, Schreiber had the power to sell and dispose of the real estate of the firm in the same manner as if it had been personal property, and that consequently Schreiber's deed conveyed to him Vogel's title to the lot, as well as Schreiber's; that, as a result, he, the appellant, obtained a full title to the entire lot, subject only to the claim of Kastner under his purchase at the sheriff's sale; that, having redeemed the lot from the sale to Kastner, all liens against it were discharged, and his title was complete; that, at all events, as Kastner accepted the redemption money, the firm of Kastner & Renner, for whom he was evidently acting, are estopped from asserting any further lien or claim against the lot.

As to the power of a partner over the real estate of a firm, we understand the rule to be, that no partner or proportion of partners can sell or transfer the real estate of the firm outright for money, or by way of mortgage, or to assignees in trust for debts, without the consent and authority of the other partners.

One partner may contract debts and make contracts which will indirectly reach the realty, because it must finally be subject to the debts of the firm; but he can not directly convey or appropriate it, excepting so far as he has the legal title in himself. It would seem, therefore, that the power of a partner over the real estate of the firm is less than that over the personal estate, and that the deed of Schreiber to the appellant did not transfer the interest of Vogel in the lot. *Parsons Partnership*, 376.

As to Vogel's interest, the appellant was a volunteer,

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only, in his redemption of it from the sale to Kastner, and acquired no lien or precedence by such redemption. It is only a mortgagee or judgment creditor who acquires a lien on real estate by advancing money to redeem it. 2 R. S. 1876, p. 220.

Whether Kastner might not have successfully resisted the appellant's right to redeem Vogel's interest is a question we need not decide, as his acceptance of the redemption money recognized the appellant's right to redeem it, and estopped him from afterward denying that right. To that extent, we think, Kastner was estopped by his acceptance of the redemption money, and no further. *Phyfe v. Riley*, 15 Wend. 248.

When real property is redeemed from a sale under execution, either by the owner or some one else acting in his behalf, the certificate of sale is simply annulled, and the property restored to the position it occupied before the sale, with the judgment lien or liens reinstated for any balance or balances remaining unpaid, and may be resold to discharge such judgment lien or liens. *Wood v. Colvin*, 5 Hill, 228; *Bodine v. Moore*, 18 N. Y. 347.

Independently of any authority on the subject, we think that is the fair and reasonable construction of our statute for the redemption of real estate sold on execution, and we hold that such is its proper construction.

If Schreiber had redeemed the property, without conveying it to the appellant, he clearly could not have objected to a resale of it for the payment of any unpaid balance of a judgment lien against him. We can not see on what principle it can be claimed, that the appellant, as the grantee of Schreiber, occupies any better or more favorable position.

We are, therefore, led to the conclusion, that the court below did not err in sustaining the demurrer to the complaint.

The judgment is affirmed, at the costs of the appellant.

The State v. Ward.

THE STATE v. WARD.

CRIMINAL LAW.—Billiards.—Suffering Minor to Play.—Indictment.—Motion to Quash.—An indictment charged the defendant with having allowed a certain minor, with other minors not named, "to play at a certain game, on a billiard table, called billiards," in his saloon, "of which he was then and there the owner."

Held, on motion to quash, that it is not necessary to aver that such game was played for a wager.

Held, also, that the averment as to the ownership of the billiard table is too vague, and, therefore, that the indictment is bad.

From the Porter Circuit Court.

T. J. Wood, Prosecuting Attorney, and *C. A. Buskirk*, Attorney General, for the State.

BIDDLE, C. J.—The appellee was charged by indictment, as follows:

"The grand jurors of the county of Porter, and State of Indiana, upon their oaths, present, that Thomas Ward, on or about the first day of January, A. D. 1874, at and in the county of Porter, and State aforesaid, did then and there unlawfully allow, suffer and permit one Harry Pagan, a person under the age of twenty-one years, and other persons under the age of twenty-one years, to play at a certain game on a billiard table, called billiards, then and there in his saloon in the city of Valparaiso, in said county, of which he was then and there the owner; contrary," etc.

On motion of the appellee, the court quashed the indictment, and rendered judgment accordingly. The State excepted and appealed.

The indictment is founded on section 1 of the act of March 8th, 1873, 2 R. S. 1876, p. 484, which is as follows:

"SECTION 1. *Be it enacted*, * * * That if any person owning or having the care, management, or control of any billiard table, bagatelle table or pigeon-hole table, shall allow, suffer or permit any minor to play billiards, bag-

The State v. Ward.

atelle or any other game at or upon such table or tables, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each game so allowed, suffered or permitted to be played, be fined in any sum not less than five dollars nor more than fifty dollars."

The State contends that the words, "to play billiards," as used in the act, do not mean to play a game of billiards for a wager; and, in this view, we think the State is right. The State also contends that it is not necessary for the owner of the billiard table to allow, suffer or permit more than one minor "to play billiards," to constitute the offence. In this construction also, we think the State is right.

The purpose of the act is, doubtless, to prevent persons from allowing minors to play billiards, bagatelle, pigeon-hole, or any such game, in public places. It was not designed to affect the general statute against gaming. Neither the word "game" nor "gaming" is used in the act.

But it seems to us that there are some defects in the indictment for which it was properly quashed. The pleader intended to allege in the indictment, that the appellee was the owner of the billiard table; but we do not think the averment is sufficiently plain. In the sentence, "of which he was then and there the owner," the pronoun "which" can not safely be referred past "his saloon" to "a billiard table," as its antecedent. Such a construction would be altogether too loose for criminal pleading. The words must be taken in their most direct and plain sense, and the pleading construed most strongly against the pleader. Under these rules, the averment, that the appellee was the owner of the table, is insufficient. See *Hanrahan v. The State*, ante, p. 527.

The judgment is affirmed, with costs.

HOLCRAFT V. MELLOTT.

57 539
150 385

USURY.—Pleading.—Demurrer.—Motion to make Specific.—Promissory Note.—

Practice.—Where, in an action on a promissory note, the defendant answers alleging that such instrument is the last of a series of usurious renewals of a usurious promissory note, and that the real principal, and lawful interest thereon, have been overpaid, and asking to recoup the excess, an objection that the dates of such renewals, and of the payments thereon, are not alleged, should be made, not by demurrer, but by motion to make more specific.

SAME.—Recoupment.—Repeal of Statute.—Direct Action.—By the act of March 9th, 1867, (1 R. S. 1876, p. 599,) concerning interest on money and the recoupment of usury, so much of section 5 of the act of March 7th, 1861, (1 R. S. 1876, p. 599,) on the same subject, as amended by the act of December 19th, 1865, (3 Ind. Stat., p. 316,) as prohibited the recoupment of usury was repealed, but that part of such section prohibiting a direct action therefor is still in force.

SAME.—Promissory Note.—Dismissal of Action.—Effect of.—Practice.—Where, in an action on a promissory note wherein the defendant answers seeking to recoup usurious interest, alleged to have been paid, the plaintiff dismisses his complaint, such dismissal carries all the pleadings out of court, and the defendant can not prove or recover such usury.

SAME.—Extent of Recovery.—No Judgment for Excess.—Recoupment of usurious interest, alleged to have been paid on a promissory note in suit, can be had only to the extent of any balance due on such note, and judgment for any excess of such usury can not be rendered.

SAME.—Recoupment.—Set-Off.—In recoupment, the defendant can only use his claim in diminution or abatement of the plaintiff's cause of action, and can not, as in set-off, recover for the excess of his claim over that of the plaintiff.

From the Tipton Circuit Court.

J. Green, D. Waugh and J. Waugh, for appellant.

N. R. Overman and J. T. Cox, for appellee.

Howk, J.—The appellant, as plaintiff, sued the appellee and two other persons, as defendants, in the court below, on a promissory note. The note was for two hundred and twelve dollars, was dated December 23d, 1873, was executed by the defendants, was payable twelve months after date to the order of the appellant, with interest at the rate of ten per cent. per annum after matur-

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ity, and was credited with one hundred and sixty dollars, paid December 29th, 1874. This suit was brought to recover the residue of said note, which was alleged to be due and wholly unpaid.

To appellant's complaint, the appellee separately answered in two paragraphs.

In the first paragraph, the appellee alleged, in substance, that he admitted the execution of the note sued on, but he averred, that said note was usurious and void, and was corruptly and usuriously obtained by the appellant, in this: that on January 12th, 1869, appellee borrowed of the appellant the sum of five hundred dollars, and gave his note for five hundred and ninety dollars, of which note ninety dollars was interest for one year on said sum of five hundred dollars; that appellee paid on said note, at one time, two hundred dollars, and at another time, thirty-five dollars; that on December 5th, 1870, appellee took up said note and gave the appellant a new note for four hundred and thirty-six dollars; that on June 1st, 1871, appellee took up said last note and gave the appellant a new note for five hundred and twenty dollars and eighty cents; that he paid on said last mentioned note three hundred dollars, and, on April 23d, 1873, took up said note, and gave the appellant a new note for three hundred and twenty dollars; that appellee paid on said last note the sum of one hundred and forty dollars, and, on December 23d, 1873, took up said note, and gave the appellant the note now in suit for two hundred and twelve dollars; that appellee had paid on the note in suit one hundred and sixty dollars, and that all said notes bore interest at the rate of ten per cent. Wherefore the appellee prayed, that he might be allowed to recoup the illegal interest so paid to appellant, against the sum claimed by appellant on said note, and asked judgment for the residue.

In the second paragraph of his answer, the appellee set out the same payments as he had stated in the first para-

graph, but with no more certainty as to the dates of such payments; that the sum borrowed by the appellee from the appellant, on the 12th day of January, 1869, was five hundred dollars, and the aggregate of such payments thereon was eight hundred and fifty-five dollars, and that the note in suit was given for the balance due, or claimed to be due, on said sum of five hundred dollars. Wherefore the appellee said, that he had overpaid the amount due on said indebtedness, on notes corruptly, fraudulently and usuriously obtained by the appellant, and he demanded judgment for three hundred dollars, the sum so overpaid over and above the balance claimed to be due on the note sued on.

To each paragraph of the appellee's answer, the appellant demurred for the want of sufficient facts therein to constitute a defence to the action, which demurrers were severally overruled, and the appellant excepted to these decisions.

The appellant then replied in two paragraphs, the first being a general denial, and the second setting up affirmative matter, which we need not specially notice.

To the second reply the appellee demurred for the want of sufficient facts therein, which demurrer was sustained, and to this decision the appellant excepted. And the appellant then dismissed this action, at his own proper costs, and judgment was rendered against him, by the court below, for all the costs of the action.

After this dismissal of the cause, on the appellee's motion, and over the appellant's objections and exceptions, the court below allowed the appellee to make proof of the matters alleged in his answers; and, upon said answers and proof, the court found for the appellee, against the appellant, in the sum of two hundred and five dollars. And appellant's written motion for a new trial having been overruled, and his exception saved to such decision, a judgment was rendered by the court below, on its said

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finding, from which judgment this appeal is now prosecuted.

In this court, the appellant has assigned as errors the decisions of the court below, in overruling his demurrers to appellee's answers, and in overruling his objections to the trial on appellee's answers after appellant's dismissal of the action, and in overruling appellant's motion for a new trial.

There is a want of clearness and certainty in the averments of each paragraph of appellee's answer, which would prevent us from regarding either paragraph as a model of good pleading. But this defect in, or objection to, a pleading of any kind is one that a demurrer for the want of sufficient facts will seldom reach. A motion to make more specific is generally the proper remedy, and it was so in this case.

In our opinion, the court below committed no error in overruling the appellant's demurrers to the appellee's answers.

Did the court below err in retaining the appellee's answers, after the appellant's dismissal of the action, as a separate action by the appellee, and in allowing the appellee to go to trial on his answers, and in making a finding and rendering judgment, in favor of the appellee and against the appellant, for the amount of usurious interest paid by the appellee to the appellant? This is really the controlling question in this case.

By the last clause of the 5th section of "An act regulating interest on money," etc., approved March 7th, 1861, it was provided, "that in all cases in which money or any other thing of value shall have been voluntarily paid as interest for the loan, use, or for usance of money, the same shall not be recovered back, either directly or by any [way] of set-off, or counter-claim or payment." 1 R. S. 1876, p. 600.

This clause, just cited, was enacted by an amendatory act, approved December 19th, 1865. 3 Ind. Stat., p. 316.

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The act entitled "An act concerning interest on money, and to provide for the recoupment of usurious interest," approved March 9th, 1867, contained this provision: "All interest exceeding the rate of ten per centum per annum shall be deemed usurious and illegal, as to the excess only, and in any action upon a contract affected by such usury, such excess may be recouped by the defendant whenever it has been reserved or paid before the bringing of the suit." 1 R. S. 1876, p. 599, sec. 2, note 2.

The act last cited contained no repealing clause or section; but, being the later expression of the legislative will on the subject of "interest on money," this act repealed, by implication, so much, and only so much, of the provisions of the act of March 7th, 1861, and of the amendatory act of December 19th, 1865, before cited, on the same subject, as was in conflict or inconsistent therewith.

The act of March 9th, 1867, certainly repealed, by implication, so much of the amended 5th section, before cited, of the act of March 7th, 1861, as prohibited the recoupment of usurious interest; but the prohibition in said amended section, against a direct action for the recovery back of usurious interest voluntarily paid, has not been repealed in any manner, and is still a part of our law.

When the appellant in the case at bar dismissed his action, there was thereafter no action pending in the court below on the note affected with usury, and the appellee's answers or counter-claims became and were direct actions for the recovery back from the appellant of usurious interest, which, we must assume, the contrary not appearing in said answers, had been voluntarily paid to him by the appellee.

It is very clear to our minds, that, after the dismissal of his action by the appellant, the appellee could not maintain an action, on or by his answers or counter-

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claims, for the recovery back of the alleged usurious interest by him paid to the appellant.

There was, then, no action on the note, and the law only provides for recoupment of usurious interest in an action on the "contract affected by such usury," and prohibits a direct action for the recovery back of such interest, when voluntarily paid.

It seems to us, therefore, that, when the appellant dismissed his action, the appellee's answers or counter-claims were no longer available to him, under the law, for any purpose, and ought to have been dismissed at once, without any attempted trial or hearing thereon.

In our opinion, the trial, finding and judgment of the court below, on the appellee's answers or counter-claims, were each and all erroneous, and without any authority of law therefor.

If the appellant had not dismissed his action, the appellee could only have recouped, on the trial of the action, to the extent of the balance found due the appellant on the note in suit. If the excess of the interest paid by the appellee over ten per centum per annum had amounted to a sum greater than the balance due on the note, he could have recouped only to the extent of the appellant's claim, and he could not have recovered in this action the surplus over the amount of such claim. *Stow v. Yarwood*, 14 Ill. 424; *Ward v. Fellers*, 3 Mich. 281; *Britton v. Turner*, 6 N. H. 481; *Batterman v. Pierce*, 3 Hill (N. Y.) 171.

In recoupment, a party-defendant can only use his claim in diminution or abatement of the plaintiff's cause of action, and can not, as in set-off, recover the excess of his claim over that of the plaintiff in such action. So that the judgment of the court below in this action, in favor of the appellee and against the appellant, could not be sustained in any view of the question.

The judgment of the court below is reversed, at the

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appellee's costs, and the cause is remanded, with instructions to dismiss the appellee's answers or counter-claims at his costs.

HARTMAN V. HEADY ET AL.

57	645
153	698

INJUNCTION.—*Enjoining Lawsuit.*—Legal proceedings will not, as a general rule, be enjoined on grounds of which the defendant therein may avail himself in defence of such action.

SAME.—*Threats.*—Threats made by the plaintiff in an action, that he will bring other actions against the defendant, afford no ground to the latter to enjoin the further prosecution of such action.

From the Hamilton Circuit Court.

D. Moss and *T. J. Kane*, for appellant.

W. Garver and *J. S. Losey*, for appellees.

WORDEN, J.—Charles W. Heady, as trustee of Delaware Township, in Hamilton county, sued Hartman, as supervisor of one of the road districts of the township, before Sidney Cropper, a justice of the peace of the township, to recover a penalty of ten dollars, as authorized by statute, (1 R. S. 1876, p. 861, sec. 25,) for failure, on notice, to open and work a highway, established by order of the board of commissioners of the county. Thereupon, Hartman commenced this action in the circuit court, against both Heady and Cropper, the justice, to enjoin the prosecution of the action before the justice, on the ground that the road was too indefinitely described to be valid, and that the order of the board of commissioners was a nullity.

A temporary restraining order was granted, but was afterward set aside, and a demurrer to the complaint, for want of sufficient facts, was sustained. A motion

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was made by the plaintiff to reinstate the temporary restraining order, but this motion was overruled.

The errors assigned are upon the ruling below, in sustaining the demurrer to the complaint, and in overruling the motion to reinstate the temporary restraining order.

We are of opinion that the rulings were right. We perceive no ground on which Heady, as such trustee, should have been enjoined from prosecuting his action against Hartman. If the road was not sufficiently described, or if, for any other cause, the order of the board of commissioners, establishing the same, was void, the fact could have been shown in defence of that action. There was no need whatever of a resort to an injunction. It is said by an elementary writer, that "The most frequent ground for refusing relief by injunction against a suit at law is that the defence urged may be used in the action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person aggrieved may avail himself in defence of the action at law." *High Injunctions*, p. 31, sec. 46.

But it is claimed that an injunction ought to be granted in order to prevent a multiplicity of suits. It is alleged in the complaint, that "the defendant Heady gives out in speeches that he will, as such trustee, continue to repeat said prosecutions, from time to time, until the directions contained in said order are complied with, and said supposed public highway opened up for travel."

We do not see that threats to bring other actions afford any ground for enjoining the prosecution of the one already commenced. We have seen, that, if the order of the board of commissioners was a nullity, the defendant in the original action could have defended on that ground; and if that action shall proceed to trial, and the defence be established, the record of that action would bar other actions for the same cause.

The judgment below is affirmed, with costs.

Harper v. Harper.

HARPER v. HARPER.

STATUTE OF FRAUDS.—*Contract in Consideration of Conveyance of Land.*—A verbal agreement by the grantee, with the grantor, of certain lands, that, in consideration of such conveyance, the former will support the latter during his life, is not within the statute of frauds.

STATUTE OF LIMITATIONS.—*Exception.*—*Pleading.*—In an action on account for money loaned, where the six years' statute of limitations is pleaded, a reply that such money is part of a mutual running account, remaining unsettled, and extending up to the time of bringing the action, is sufficient on demurrer.

PRACTICE.—*Evidence.*—*Witness.*—*Cross-Examination.*—*Supreme Court.*—Where, on appeal to the Supreme Court, it does not appear from the record, that a conversation, attempted to be elicited on cross-examination as occurring in connection with a matter concerning which the witness has testified, had occurred, there is no available error in the refusal of the court to permit such cross-examination.

From the Harrison Circuit Court.

W. N. Tracewell and *R. J. Tracewell*, for appellant.

W. T. Jones, *S. J. Wright*, *S. K. Wolfe* and *A. Stephens*, for appellee.

PERKINS, J.—This was a suit to recover for work and labor done, goods sold and delivered, and real estate conveyed.

The fifth paragraph of the complaint was for the value of two hundred acres of land, conveyed to the defendant in consideration that he should support the grantor and his wife during their lives, alleging that he had failed and refused to furnish such support.

A demurrer to this paragraph was overruled, and exception reserved.

Issues were formed in the cause, and were tried by a jury, who returned a verdict for the plaintiff for two thousand dollars.

A motion for a new trial was overruled, and exception reserved.

The legal causes for a new trial, assigned in the motion, were these :

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1. The action of the court in refusing to permit the defendant to give certain testimony on the trial;
2. In admitting certain testimony offered by the plaintiff;
3. That the verdict was not sustained by the evidence; and,
4. That it was contrary to law.

The alleged errors of the court below, legally assigned in this court, are these:

- 1st. Overruling the demurrer to the fifth paragraph of the complaint;
- 2d. Overruling the demurrer to the third paragraph of reply to the fourth paragraph of answer;
- 3d. Overruling the demurrer to the third and fourth paragraphs of the amended complaint; and,
- 4th. Overruling the motion for a new trial.

We proceed to notice the errors assigned, but not in the order of assignment.

The objection to the fifth paragraph of complaint was, that the contract alleged in it was void by the statute of frauds.

That contract was not within the statute. *Bell v. Hewitt's Ex'rs*, 24 Ind. 280; *Fisher v. Wilson*, 18 Ind. 133; *Stater v. Hill*, 10 Ind. 176.

As to the ruling upon the third paragraph of reply to the fourth paragraph of answer. The fourth paragraph of answer was addressed to the second paragraph of complaint. That paragraph was for the recovery of the amount of a loan of two thousand and fifty dollars, made on a certain day in 1855. This suit was commenced on the 15th day of September, 1873, eighteen years after the loan; and the fourth paragraph of answer was the statute of limitation of six years. The reply was, that there had been, from 1855 to 1873, mutual running accounts between the parties, one item of which was the said item for loaned money, which running accounts were yet un-

Harper v. Harper.

settled. No motion was made to make the reply more certain.

We think the paragraph was properly held good on a demurrer for want of facts. See *Sanders v. Sanders*, 48 Ind. 84.

The amended paragraphs of complaint, severally, were as follows :

The third was for the value of two hundred acres of land sold and conveyed, and the fourth was for the value of services rendered for the defendant at his request.

The paragraphs were good.

One of the grounds of the motion for a new trial was the refusal by the court to permit one Ellis, a witness, to answer a question on cross-examination. The witness had stated, in his original examination, that the defendant told him, that he, defendant, owned the farm. On cross-examination, defendant's counsel asked the witness to state all that was said in that conversation. The court sustained an objection to the question being answered. The witness was not asked whether there was, and there is no intimation in the record that there was, any conversation except what the witness had stated. If there was not, the defendant was not harmed by the ruling of the court.

The second ground of the motion for a new trial is not noticed in the brief of appellant.

As to the third and fourth, we need only say, that the evidence tends to sustain the verdict, and it is not shown to be contrary to law.

We call the attention of appellant's counsel to points of practice settled by the following cases: *Cool v. Cool*, 54 Ind. 225; *Cones v. Binford*, 54 Ind. 516.

The judgment below must be affirmed, with costs.

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JOYCE ET AL. v. WHITNEY ET AL.

57	550
125	559
136	160
57	550
130	20
57	550
138	635
57	550
167	427

VENUE.—*Change from Judge.*—*Affidavit.*—*When not Necessary.*—Whenever the judge of a court is notified in any manner, whether by affidavit or by a mere suggestion of a party, that a cause in which he has acted as counsel is pending before him, it is his privilege, as well as his duty, to refuse to try such cause, and to set the same for trial before some other judge.

PRINCIPAL AND SURETY.—*Proceeding to Try.*—*Summons.*—*Notice.*—*Judgment.*—*Former Adjudication.*—Where, in an action on a promissory note against several apparently joint makers, one of the defendants appears, and, upon default of his codefendants, and without any notice to them other than the original summons in the cause, alleges, and obtains a judgment against them, that they are principals and he a surety only, and asks and obtains a decree that execution be first levied on their property, such judgment and order, as between the defendants, are utterly void for want of proper notice, and will not support a plea of a former adjudication of such matter.

SAME.—*Pleading.*—The complaint of one defendant against another, to establish the alleged suretyship of the former, is not a mere cross-complaint, but is a new and original proceeding which can not be tried upon the summons issued by the plaintiff.

From the Jefferson Circuit Court.

E. R. Wilson, for appellants.

Howk, J.—The appellants, as plaintiffs, sued the appellees, as defendants, in the court below.

In their complaint, the appellants alleged, in substance, that on the 12th day of September, 1871, the appellee Noah Neal, jointly with the appellants and the appellee James Comley, executed to the appellee Edwin G. Whitney, President, a note payable at The Indiana Bank, at Madison, Ind., for six hundred dollars, due three months after date, with attorney's fees if the same had to be collected by legal process; that said note was so executed by said Noah Neal as principal therein, and by the appellants and James Comley as the sureties of said Neal therein, and not otherwise, as said Whitney, as well as said Neal and Comley, at the time well knew; that after-

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ward, on October 1st, 1872, said Whitney, as president of said bank, brought suit on said note against said Neal, Comley and the appellants, in the court below, and such proceedings were had by said Whitney and said Comley, in said suit, as that afterward, on October 31st, 1872, by the consideration of said court, said Whitney obtained a judgment therein, against said makers of said note, for six hundred and fifty-two dollars and fifty cents, due thereon, and for thirty-two dollars and fifty cents attorney's fees for collecting the same, and for costs of suit; that said judgment was so rendered against the appellants as principal makers of said note with said Neal. And it was then further ordered and adjudged, that the same be first levied of the property of the appellants, jointly with the property of said Neal, and that only on default of realizing the same out of their said property, was the same, or any part thereof, to be levied of the property of said Comley, who was declared their surety, all of which would more fully appear from the records of the court below, to which reference was made; that, in truth and in fact, the appellants were only sureties, jointly with said Comley, and not otherwise, as was well known to all the parties to said action, and the said Whitney was only entitled to a judgment against appellants, on said note, as sureties jointly with said Comley for said Noah Neal, and not otherwise, and that said judgment should first be levied of the property of said Noah Neal. Wherefore the appellants asked that said question of suretyship be tried, and they demanded judgment that they be declared sureties on said note, jointly with said Comley, for said Noah Neal, and for proper relief as such sureties.

It appears by a bill of exceptions, properly in the record, that when this cause was first called for issues in the court below, the appellee Comley suggested that Hon. John R. Cravens, then judge of said court, had been the attorney of the appellee Whitney, in procuring the judgment mentioned in appellants' complaint, and objected

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to being put under rule to answer said complaint by said judge, for the reason that said judge had been of counsel for said Whitney, and ought not to take any steps in this case, because of said relationship; and thereupon Judge Cravens, of his own motion, refused to allow any steps to be taken in said cause before him, and set the same for a special term, before some other judge; to all of which rulings and doings the appellants at the proper time excepted.

Afterward, at a special term of the court below, and before another judge, the appellees Whitney and Neal made default, and the appellee Comley appeared by counsel and filed his answer to the appellants' complaint. In this answer, the appellee Comley alleged, in substance, that when the said Whitney, as president of The Indiana Bank, commenced an action on the note described in appellants' complaint, a summons issued in said action was personally served on the appellants, the said Neal and the said Comley, more than ten days before the first day of the October term, 1872, of the court below; that, when said action was called at said last named term of the court below, the appellants and said Neal made default, but the appellee Comley appeared and filed an answer, by way of cross-complaint against the appellants and said Neal, alleging therein that he signed said note, then in suit, as the surety of the appellants and said Neal, and asking that said matter of suretyship be enquired into, and that judgment be rendered, requiring the said Whitney to exhaust the property of the appellants and said Neal, before proceeding against the property of the appellee Comley; that said action was tried by the court below, without a jury, and a finding and judgment were made and rendered in favor of said Whitney, for the amount due on said note, and in favor of said Comley, that he was the surety only of the appellants and said Neal, on the note sued on; and an order was made that the sheriff, to whom an execution might issue on said

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judgment, should first levy upon and exhaust the property of the appellants and said Neal, before any levy was made on the property of said Comley; and the appellee Comley averred that the same matters and things and the same identical question were involved, and were tried and determined, in said action of Whitney against the appellants, said Neal and said Comley, that the appellants then sought to have tried in this action; wherefore, etc.

The appellants demurred to appellee Comley's answer, for the want of sufficient facts therein to constitute a defence to appellants' complaint, which demurrer was overruled by the court below, and to this decision the appellants excepted.

And the appellants then replied to said Comley's answer by a general denial. And the matters in issue were tried by the court without a jury, and a finding made in favor of said Comley. And the appellants' written motion for a new trial having been overruled, and their exception saved to such finding, judgment was rendered by the court below on its finding.

In this court, the appellants have assigned the following alleged errors of the court below :

1st. Error of Judge Cravens in refusing to preside as judge in this cause, and in selecting a special judge therefor;

2d. In overruling the appellants' demurrer to the separate answer of the appellee James Comley;

3d. In overruling appellants' motion for a new trial;

4th. In overruling appellants' motion in arrest of judgment; and,

5th. In rendering and entering said judgment over appellants' objections.

The first question suggested by these alleged errors, or rather the first error, relates to the action of Judge John R. Cravens, the judge of the court below, in refusing to preside in the trial of this cause, and in setting the same down for trial at a special term, and before another judge.

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One of the parties to this cause, it appears, suggested to Judge Cravens, that he had been the attorney of the plaintiff Whitney in obtaining the original judgment, mentioned in appellant's complaint, and objected on that ground to his presiding as judge in the progress of this cause.

The first statutory cause for a change of venue, as it is inaptly called, in civil actions, is as follows:

"*First.* That the judge has been engaged as counsel in the cause prior to his election or appointment as judge, or is otherwise interested in the cause." 2 R. S. 1876, p. 118, sec. 207.

The statute contemplates, that the application for a change of venue should be "made upon affidavit;" and, in this case, the appellants insist, that, because no affidavit was filed for a change of venue, therefore the court below had neither the right nor the power to set this cause for a special term, nor to call another judge for its trial.

We do not concur with this view of the matter. In our opinion, whenever a judge of a court is notified in any manner, that a cause, in which he has been engaged as counsel for any of the parties, is pending before him, his self-respect, and his duty as a servitor in the administration of justice, alike demand that he should promptly refuse to sit as a judge in the hearing of such cause, even with the consent of all the parties.

Judges are by no means free from the infirmities of human nature, and, therefore, it seems to us, that a proper respect for the high positions they are called upon to fill should induce them to avoid even a cause for suspicion of bias or prejudice, in the discharge of their judicial duties.

In this case, we think that the course pursued by Judge Cravens was proper and legal, and the only one he could pursue, with due respect for himself and his high office. His course in this respect was fully sanctioned and author-

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ized by the act of March 1st, 1855. 2 R. S. 1876, p. 10.

The important and controlling question in this cause arises upon the alleged error of the court below, in overruling the appellants' motion for a new trial.

The evidence on the trial is in the record by a proper bill of exceptions. It appears therefrom, that the appellee James Comley gave in evidence what we suppose to have been a complete record of the original cause of Whitney, President, etc., against said Noah Neal, the appellants and said James Comley. We say, that we suppose it to be such a record, because the said Comley wholly failed to identify the same as such record by any proper evidence. Assuming, however, that it is such a record, does it show, that the matters stated in appellants' complaint in this cause were so tried and determined in said original action as to make the record thereof a complete bar to the appellants' action?

It appears therefrom, that on the 1st day of October, 1872, the said Whitney, President, etc., commenced an action, in the court below, on the note mentioned in appellants' complaint, which note, on its face, was the joint and several note of the said Noah Neal, the appellants and said James Comley. The summons issued in said action required the defendants thereto, the said makers of said note, to answer the complaint of said Whitney, President of The Indiana Bank, to whose order said note had been made payable. Afterward, at the October term, 1872, of the court below, it was shown to said court by the sheriff's return to said summons, that all said defendants had been duly and legally served with process, for more than ten days before the first day of said term of said court. Thereupon said record proceeds as follows:

"The defendants Noah Neal, James Joyce and Franklin Joyce, having been each three times audibly called, come not, but herein wholly make default, and the defendant James Comley, by his attorney, files his answer herein, which reads as follows, to wit:

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“ ‘The said James Comley, answering said complaint, says, by way of cross-complaint against his codefendants herein, he signed said note sued on as surety for said defendants, and in no other or different capacity, and he asks that said matter be inquired into, and that judgment be rendered requiring said plaintiff to exhaust the property of the other defendants before proceeding against the property of this defendant.’ ”

And it further appeared from said record, that, on the same day of the filing of said cross-complaint by said James Comley, and without any notice whatever thereof, the court below assumed to hear the matters involved in said cross-complaint, and made a finding and rendered judgment accordingly, among other things, that said James Comley was the surety of the other defendants to said action, and that the property of said other defendants should be first levied upon and exhausted, before any levy was made on the property of said James Comley.

It will be observed, that said James Comley does not controvert any of the matters alleged in appellants' complaint in this cause, nor does he allege in his answer, that he is, in fact, the surety of the appellants on the note referred to, but, in lieu thereof, he relies solely and exclusively on the judgment so rendered in his behalf, in the original suit, as a bar to the appellants' action. That judgment, so obtained by said Comley, without any notice whatever to appellants of his so-called cross-complaint, was and is of no validity whatever for any purpose.

It is provided by the 674th section of the practice act, that, in any action on contract, against two or more defendants, “the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined, upon the issue made by the parties, at the trial of the cause, or at any time before or after the trial, or at a subsequent term.” 2 R. S. 1876, p. 277.

It never was intended by this provision, that, in an action on such contract, one of the parties might appear,

and file a so-called cross-complaint, and, upon the default of the other parties in the original action, in their absence, and without any notice to them of such so-called cross-complaint, have the same "tried and determined," and a valid and binding judgment rendered thereon. In such a case, the complaint of the surety, not his cross-complaint, is a new and original proceeding, and is independent of the proceedings of the plaintiff, in his action on such contract.

It is expressly provided, in the section before cited of our code of practice, that the proceedings of the surety, on his complaint, "shall not affect the proceedings of the plaintiff." If the other defendants are present in court, in person or by attorney, at the time of the filing of the surety's complaint, and have actual knowledge thereof, then such complaint might be "tried and determined," if the parties were ready, with the original action. But it will not do to say, that, on a summons issued and served in an action on the contract, upon the filing of a complaint by one of the defendants as surety in such contract, the other defendants can at once be defaulted as to such complaint, without any notice whatever thereof. This point was settled, by this Court, in the case of *Fletcher v. Holmes*, 25 Ind. 458. And, upon the point now under consideration, the doctrine of the case cited, it seems to us, ought never to have been doubted nor questioned by this court, in any case, where the matter set up in the cross-complaint was not apparent in the original complaint.

In that case, in delivering the opinion of the Court, FRAZER, J., first stated the rule in chancery, that "when a defendant sought relief against a codefendant, as to matters not apparent upon the face of the original bill, he must file his cross-bill, alleging therein the matters upon which he relied for relief, making defendants thereto of such codefendants and others as was proper, and process was necessary to bring them in. The filing of the cross-bill

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was regarded in some sense as the commencement of a new suit."

And the learned judge then added:

"It must be quite obvious that the application of the rule of chancery practice to a case like the one under consideration is well adapted to prevent abuses, and is indeed absolutely necessary to the purposes of justice. The principle is indeed fundamental, that a party shall not be bound by adversary proceedings without notice and an opportunity to be heard."

In the case at bar, it seems to us, that the record, given in evidence by the appellee Comley, in so far as the proceedings and judgment on his so-called cross-complaint were concerned, was invalid and void on its face, as against the appellants, for the want of any notice whatever to them of such cross-complaint.

We hold, therefore, that the finding of the court below was not sustained by sufficient evidence, and, for this reason, that the court below erred in overruling the appellants' motion for a new trial.

In so far as the cases of *Pattison v. Vaughan*, 40 Ind. 253, and *Fentriss v. The State, ex rel., etc.*, 44 Ind. 271, appear to be in conflict with this decision, they are overruled.

The judgment is reversed, at the costs of the appellees, and the cause is remanded, with instructions to sustain the appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

The Louisville, New Albany and Chicago R. W. Co. v. Stover.

57	559
159	19

THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W. Co. v.
STOVER.

RAILROAD.—*Killing Stock.—Summons.—Service of.—Appearance.—Waiver.—*

In an action against a railroad company, to recover for live-stock killed by the cars of the defendant, a failure to serve the summons on the defendant, by a delivery of a copy thereof to the conductor, as required by statute, is waived by the appearance of the defendant to the action.

From the Montgomery Circuit Court.

S. C. Willson and *L. B. Willson*, for appellant.

Thompson & Thompson, for appellee.

PERKINS, J.—Suit by appellee, against appellant, before a justice of the peace, to recover the value of a cow killed by appellant's cars, at a point where the road was not securely fenced.

Process was served upon a conductor of the road, but a copy of the process is not in the record.

On the 29th of November, 1875, the parties appeared before the justice, and, by agreement, the cause was continued to the 20th of December then next ensuing. At the time to which the cause was continued, "the parties appeared in person and by attorneys," says the transcript of the justice, and a trial of the cause was had, resulting in a judgment for the plaintiff, in the sum of fifty dollars, and costs.

The defendant appealed to the circuit court. In that court, the parties appeared by their attorneys, waived a jury, and submitted the cause for trial to the court, who found for the plaintiff in the sum of fifty dollars, and costs.

A motion for a new trial, because the verdict was not sustained by the evidence, was overruled, and exception reserved. An appeal was prayed to the Supreme Court, and sixty days were given in which to file a bill of exceptions.

The Louisville, New Albany and Chicago R. W. Co. v. Stover.

Within the sixty days, the following bill was filed :

"Be it remembered, that, after the trial of the above entitled action and the finding of the court in favor of the plaintiff, the defendant, by her attorneys, filed her motion and reasons in writing, to wit :

"*'Stover v. The L., N. A. and C. R. W.*

"*'Comes now said defendant, and moves the court to set aside its finding herein, and for a new trial of this cause; for the reason that the finding of the court is contrary to law, and not sustained by the evidence.'*

"Which motion the court overruled, and to the ruling of the court upon said motion the defendant then and there, at the proper time, excepted, and now prays that this, his bill of exceptions, be signed, etc., which is done.

"ALBERT D. THOMAS."

Appeal to this court.

Errors assigned: That the court erred in rendering judgment as it did, and in overruling the motion for a new trial.

The evidence is not in the record.

The following is the point made in appellant's brief:

"The transcript of the justice shows no sufficient service upon the defendant, under the statute, to confer jurisdiction upon the justice."

There appears no copy of the summons in the transcript.

The appearance of the party to the cause in the two courts, and submitting it for trial therein, without objection, gave the courts full jurisdiction of the party, and superseded the necessity of a copy of the summons in the record to show it.

The judgment is affirmed, with five per cent. damages and costs.

Hodshire et ux. v. Ewan.

HODSHIRE ET UX. v. EWAN.

PLEADING.—Promissory Note.—Mortgage.—Foreclosure.—Complaint.—In an action upon a promissory note, and to foreclose a mortgage on real estate, a demurrer to the complaint, for want of sufficient facts, should be overruled, if such complaint be sufficient as to the note, though insufficient as to the mortgage.

SAME.—Practice.—Where the answer in an action consists of a general denial and a special paragraph amounting only to a general denial, there is no error in sustaining a demurrer to the latter.

SAME.—Mortgage to Indemnify.—Construction of.—A debtor, to secure a debt owing to A., having mortgaged to the latter certain real estate which he then conveyed to B., subsequently mortgaged certain other real estate to a surety upon a debt owing to C., with a provision in the latter mortgage, that, upon payment of such debt due to C., such surety should assign such mortgage to B., to secure him against such mortgage held by A., and providing that such former mortgage should be foreclosed "upon any proceedings for the collection of either debt for which" it was executed as security.

Held, in an action by A., to collect his debt, that it is not secured by such latter mortgage, and that he is not entitled to foreclosure of the same.

From the Jennings Circuit Court.

H. W. Harrington, for appellants.

BIDDLE, C. J.—In the complaint in this case, it is alleged, that the appellants made the following promissory note:

"\$300.00. NORTH VERNON, IND., Sept. 9th, 1871.

"One year after date, we promise to pay to the order of Laura Ewan three hundred dollars, at ten per cent. per annum, compounded annually, value received, without any relief from valuation or appraisement laws.

Signed,

"J. H. HODSHIRE.

"MARY J. HODSHIRE."

It is also alleged in the complaint, that the appellants, on the 28th day of January, 1874, executed a mortgage, by which they conveyed to Myron H. Andrews the undivided half of lots number 14, 15, and 16, in Block "A,"

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in the town of North Vernon, in Jennings County, Indiana, the condition of which mortgage was as follows:

"Provided always, and these presents are upon this condition, that whereas said Myron H. Andrews is my security to Hiram Elliott for the sum of one hundred and ten dollars; and whereas Laura A. Ewan holds a note against said Hodshire for the sum of three hundred dollars, and interest thereon, which said note is secured by mortgage executed by said Hodshire upon lots No. 305 and 306 in said town, and which said two last mentioned lots, since the making of said mortgage, have been sold and conveyed by said Hodshire to Josephine Pitzeuch: Now, if the said Hodshire shall pay the said sum of one hundred and ten dollars, for which the said Andrews stands security to said Elliott, and save said Andrews from liability for said payment; then this mortgage is to be assigned to said Josephine Pitzeuch, if said note of three hundred dollars, and interest, is not sooner paid to the said Ewan, or assignees, and upon the full payment of said sum for which said Andrews is security; and also pay all costs, interest, and fees, that may accrue upon said debts, and in the collections, then this mortgage to be void, or else in full effect. This mortgage to be foreclosable upon any proceedings for the collection of either debt for which this is security. Witness the hands," etc.

The complaint is founded on the above note and mortgage, and avers that the mortgage was given to secure the note. No assignment or delivery of the mortgage to the appellee is alleged.

A demurrer, alleging the insufficiency of the facts stated as ground, was overruled to the complaint, and exception reserved. This ruling is correct. The complaint is sufficient to maintain the action on the promissory note, and, being sufficient for that purpose, the demurrer was properly overruled.

The appellees then answered by a general denial, and two special paragraphs. Demurrers to the two special

Hodshire et ux. v. Ewan.

paragraphs, for the want of facts, were sustained, and exceptions taken. There is no error in these rulings. Neither of the special paragraphs amount to any thing more than a general denial.

A jury trial, upon the issue of a general denial, was had. A verdict was found in favor of appellee, for the amount due on the note, and against the appellants on the mortgage. The usual motions and rulings were had, to bring the case to this court.

Upon the trial, the note was given in evidence without objection. The mortgage was offered in evidence; objected to, on the ground of irrelevancy; objections overruled; exceptions reserved; and the mortgage admitted as evidence. The note and mortgage were all the evidence given in the case.

We can not perceive how the promissory note sued on is secured by the mortgage. It is executed to another person, for another purpose, and upon different lands, is not assigned to the appellee, and has no legal connection with this case. The mortgage stipulates, to secure the mortgagee, Elliott, against certain liabilities, as the surety of the mortgagors, and interest, costs, and fees thereon. It refers to the note in suit as being secured by a mortgage on certain other property, which was subsequently sold to Josephine Pitzeuch, and provides for its assignment to said Josephine, upon a certain contingency, probably for the purpose of securing her against the mortgage on the lots she bought from Hodshire, but it nowhere secures the payment of the note in suit.

No liability can arise on the mortgage until Elliott, the mortgagee, has been compelled to pay the debt of Hodshire, for which he stands as Hodshire's surety, and there is no averment of such payment in the complaint. There is no breach of the condition of the mortgage shown in the complaint. We cannot see how any claim or right can accrue, on the face of the mortgage, to the appellee. It is nowhere provided in the mortgage, that

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any such claim should arise upon any contingency, but it is expressly stipulated, that, if the note sued on in this suit is not paid upon a certain condition, the mortgage shall be assigned to Josephine Pitzeuch, and not to the appellee in this case.

In our opinion, the mortgage was improperly admitted in evidence; but, as it is plain that the appellee is entitled to judgment on the note, and as that part of the judgment is separable from the decree of foreclosure, the judgment upon the note is affirmed, and that part of the judgment decreeing a foreclosure of the equity of redemption and sale of the lands is reversed, at the costs of the appellee.

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57	564
182	16
162	533

PLEADING.—Real Estate.—Action to Recover.—Conveyance.—Condition Subsequent.—Breach.—Where, because of an alleged breach of a condition subsequent contained in a conveyance of real estate, the heir of the deceased grantor seeks to recover the possession of, and to quiet his title to, such real estate, the complaint should allege that such grantor, at the time of making such conveyance, was seized in fee-simple of such real estate.

SAME.—Entry.—The complaint in such action should also allege an entry upon, or claim to, the real estate, made by the plaintiff prior to bringing suit.

SAME.—Demand.—In such case, a demand for possession of the real estate, made before bringing suit, is, in this State, equivalent to an entry thereon.

From the Lake Circuit Court.

M. Wood and *T. J. Wood*, for appellants.

NIBLACK, J.—This was a proceeding by Thomas Clark, Mary Kellogg and Benjamin Kellogg, against Janna S. Holton, to recover the possession of, and to quiet the title to, a town lot.

A demurrer for want of sufficient facts was sustained

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to the complaint, and there was judgment on demurrer for the defendant.

In reviewing these proceedings here, therefore, we have only to consider the sufficiency of the complaint.

The complaint represents that the plaintiffs are the lineal descendants of one William Clark, who died in 1868, and that, by inheritance as to some portions, and by purchase from one of the other lineal descendants of the said William Clark of the remaining portion, they had become entitled to certain real estate thereafter described.

The complaint then continues to say, that "The plaintiffs further aver, that the deceased, William Clark, was the owner in fee of the following real estate, situated in the town of Crown Point, Lake County, Indiana, in the year 1840; that said William Clark conveyed, on the 18th day of November, 1840, with Solon Robinson, Russell Eddy and Jonathan W. Holton, several tracts, lots and parcels of land, in one deed, among which the following: 'Also a piece of land on Main Street, directly opposite to and east of a piece of land by this indenture conveyed by Solon Robinson for a public common, which said piece of land, by the said Clark hereby conveyed, is of like dimensions, and for the same purpose, as the said Solon's,' a more particular description being given in the conveyance aforesaid by said Robinson, Clark, Eddy and Holton to the board of commissioners of Lake County, Indiana, a copy of which is herewith filed and made a part of this complaint.

"That the plaintiffs now bring this action to recover of the defendant, and to have their title quieted to, the following lot, to wit: Lot number ten (10) in Central Addition to the town of Crown Point, it being a part of the north-east quarter of section eight (8) in town. 34, range 8 west, all in Crown Point, Lake County, Indiana, and being a fractional part of the land above described and conveyed by William Clark to the board of commis-

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sioners of said county for the purpose of a public common, and east of the part conveyed to said board of commissioners by said Solon Robinson for a public common, as fully stated in the deed copy as aforesaid, filed herewith."

The complaint then proceeds to say, that the parcel of land lying east of the tract conveyed by Solon Robinson, as aforesaid, was conveyed by the said William Clark, for a public square or public common, and for no other purpose or consideration whatever; that the public used said tract of land as a public common for about ten years after such conveyance; that, in the year 1850, the board of commissioners proceeded to sell said parcel of land for private use, and to divert the same wholly from the purpose for which it was conveyed to such board; that said land has been laid off into lots, streets and alleys, and is now used for private residences, business houses and other private uses, without the consent of the said William Clark having ever been obtained thereto; that said lot number ten (10) has fallen into the possession of the defendant, who, without right, claims to be the owner of it in fee, and keeps the plaintiffs out of the possession thereof. Wherefore the plaintiffs demand judgment that their title be quieted, and all other proper relief.

Waiving the question as to whether there is any sufficient description of the land which, it is averred, William Clark conveyed to the board of commissioners, we think the complaint is materially defective in not alleging that he was the owner in fee of the land at the time it was so conveyed. As only the grantor or his heirs can take advantage of the forfeiture of a condition subsequent in a deed, we regard such an allegation as essential to the validity of the complaint.

The complaint avers, that "William Clark was the owner in fee of the following real estate, * * * * * in the year 1840," but does not aver, that he was such

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owner at the time of the conveyance, that is to say, on the 18th day of November, 1840. It does not necessarily follow, that, because he conveyed a certain parcel of land, he was the owner of it in fee at the time of the conveyance. He may have executed a conveyance in good faith, and yet have had no estate or interest in the land, or his interest may have been less than a freehold estate. In a matter so material to the merits of the cause, the full ownership of the land at the time of the conveyance ought to have been distinctly averred, and not left to inference merely, from other averments.

It has been held by this court, that conditions subsequent are not favored in law, and are construed strictly against the grantor and his heirs, because they tend to destroy estates. *Hunt v. Beeson*, 18 Ind. 380; *Heaston v. The Board, etc.*, 20 Ind. 398.

Hence, we are required to give a strict construction to the allegations in the complaint before us.

Then, again, it is well settled, that, to enable the grantor or his heirs to recover back a tract of land, because of a forfeiture of a condition subsequent, an entry upon, or claim to, the land must be made before the commencement of the action. *Lindsey v. Lindsey*, 45 Ind. 552; 4 Kent Com. 127; *Craig v. Wells*, 11 N. Y. 315; 2 Bl. Com. 155; 3 Bl. Com. 175; *Nicoll v. The New York, etc., R. R. Co.*, 12 N. Y. 121; *Fonda v. Sage*, 46 Barb. 109; *Lincoln and Kennebeck Bank v. Drummond*, 5 Mass. 321; *Chalker v. Chalker*, 1 Conn. 79.

Under our system of jurisprudence, a demand of possession is equivalent to an entry on the premises.

No entry or demand being alleged in the complaint, it is, for that reason also, defective.

We see no error in the proceedings below.

The judgment is affirmed, at the costs of the appellants.

Small v. Small.

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146 452

SMALL v. SMALL.

DIVORCE.—Cruel Treatment.—Criminal Prosecution.—A groundless prosecution of the husband, by the wife, for an alleged crime, resulting in his trial and acquittal, is not "cruel and inhuman treatment," within the meaning of the statute, entitling him to a divorce.

From the Clark Circuit Court.

J. B. Meriwether, for appellant.

WORDEN, J.—This was an action by the appellant, against the appellee, for a divorce, on the alleged ground of cruel and inhuman treatment of the plaintiff by the defendant.

Trial by the court, which resulted in a finding and judgment for the defendant.

The plaintiff appeals to this court, and has assigned as error the overruling of his motion for a new trial.

The evidence is in the record.

The cruel treatment of which the plaintiff complains consists of a groundless prosecution against the plaintiff, for an assault and battery alleged to have been perpetrated by the plaintiff upon the defendant, with intent to murder her.

The record of the prosecution, which was had before a justice of the peace, was given in evidence. It appears, that Philip Simcoe, the father of the defendant, made the affidavit on which the prosecution was based.

The affidavit charged, that, on or about December 24th, 1878, the plaintiff herein, David Small, at, etc., "feloniously, purposely and with premeditated malice, did beat, bruise and wound the said Milly Small, with intent thereby, purposely, feloniously and with premeditated malice, to kill and murder the said Milly Small, she being then and there pregnant with a child, and thereby causing a miscarriage of the said child."

The cause thus instituted was tried before the justice,

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and the defendant in the prosecution, the plaintiff herein, was discharged.

Milly Small was examined as a witness in that prosecution, and testified that David Small struck her and tried to throw her over the bannisters, down stairs; that he then hurt her so as to produce a miscarriage, and she was prematurely delivered of a still-born child, with which she was pregnant at the time of the injury.

It was proved, however, by a physician who attended her at the time, that there was no miscarriage, and that about seven months afterward, viz., July 20th, she was delivered of a child that had gone the full period of gestation.

Assuming that the evidence of the defendant herein, on the trial of the criminal prosecution, was designedly false as to the miscarriage, it would seem that but little credit should be given to her evidence as to the assault and battery.

But, supposing the prosecution of the criminal charge to have been wholly groundless, and that the defendant herein was guilty of perjury, we are aware of no authority for holding the prosecution to be such cruel and inhuman treatment as would entitle the plaintiff to a divorce.

The last definition to the term "cruelty," given by Bishop, is as follows:

"Cruelty, therefore, is such conduct in one of the married parties as endangers, either apparently or in fact, the physical safety or health of the other, to a degree rendering it physically or mentally impracticable for the endangered party to discharge properly the duties imposed by the marriage." 1 Bishop Mar. & Div., sec. 717. See, also, note 4 to the same section, for collection of English and American cases upon the point.

Without determining what would be such cruel and inhuman treatment as would entitle a party to a divorce, we are of opinion that the prosecution noticed, though it

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may have been groundless, and though the defendant herein may have perjured herself in that prosecution, was not such treatment.

The judgment below is affirmed, with costs.

 TROUT ET AL. v. DRAWHORN.

JUSTICE OF THE PEACE.—*Relationship of to Parties.*—*Jurisdiction.*—*Marriage.*

—The fact, that a deceased former wife of a party to an action pending before a justice of the peace was the aunt of the wife of such justice, does not deprive the latter of jurisdiction of the cause, whether there be issue of such marriage alive or not.

SAME.—*Affinity.*—Relationship by affinity ceases with the dissolution of the marriage creating it, except so far as the children of such marriage are concerned.

From the Boone Circuit Court.

Clements & Wills, for appellants.

WORDEN, J.—Drawhorn brought this action against Trout and Swails, for trespass in taking and carrying away a buggy.

Issue; trial by the court; finding and judgment for the plaintiff.

Motion for a new trial overruled, and exception.

On the trial, it appeared, that Trout was a justice of the peace, and that Swails brought an action against Drawhorn, before said Trout, as such justice, on a promissory note, and that such proceedings were had as that Swails recovered a judgment against Drawhorn, before such justice, by default; that an execution, duly issued upon the judgment, was levied upon the buggy, which was duly sold thereon; and this was the trespass complained of.

We see no objection to the judgment, in respect to the

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jurisdiction of the justice over the parties or the subject-matter, or otherwise, unless it be found in the following statement of the relationship of the parties:

Lewis Drawhorn testified, upon the trial, as follows:

"I am the plaintiff in this cause, and was defendant in the case of *Josiah Swails v. Lewis Drawhorn*, before William W. Trout, a justice of the peace in and for Worth township, Boone county, Indiana. William W. Trout, the said justice of the peace and one of the defendants herein, rendered a judgment, on the 2d day of June, 1874, in favor of the said Swails, one of the defendants herein, and against me as defendant, upon default, for the sum of thirty-five dollars. My first wife was a sister of the father of the wife of the said William W. Trout. I had six children by my first wife, who was an aunt of said Trout's wife, all of whom are living at this time."

It appears, by further evidence, that the plaintiff's first wife died a considerable time before the commencement of the action before Justice Trout.

The plaintiff, by bringing this action for the alleged trespass, has treated the judgment before the justice as a nullity, upon the ground, as we suppose, of the relationship supposed to have existed between him and the justice.

The statute provides, that "No justice shall have jurisdiction in any action * * * wherein * * * the justice be related by blood or marriage to either party." 2 R. S. 1876, p. 605, sec. 10.

There does not appear to have been any consanguinity between the plaintiff and Justice Trout. Whatever relationship there had ever been between them was the affinity brought about by marriage. The plaintiff's first wife was a sister of the father of Trout's wife. But the plaintiff's first wife was dead when the action was brought before the justice of the peace. At that time, therefore, the justice was not related to the plaintiff, either by blood or marriage. There was at that time no marriage exist-

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ing between the plaintiff and any one related in any manner to the justice. Relationship by affinity ceases with the dissolution of the marriage which created it. *Blodget v. Brinsmaid*, 9 Vt. 27.

In 1 Bishop Marriage & Divorce, sec. 314, it is said, that, "In causes other than matrimonial it is held, that relationship by affinity ceases on the dissolution by death or otherwise of the marriage which created it, except as to the children of the marriage."

See cases cited in note 7 to the section.

The fact that the plaintiff had children by his first wife, living, is of no importance in the case. Their existence did not continue the relationship which had existed between the justice and the plaintiff before the death of his first wife.

There was nothing shown in the case which rendered the judgment of the justice invalid, and a new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Co.
v. BOLNER.

RAILROAD.—*Killing Stock.*—*Liability of Lessee.*—*Statute Construed.*—By the 1st section of the act of March 4th, 1863, (1 R. S. 1876, p. 751,) in relation to animals killed or injured on a railroad, it was intended, that, where a leased railroad is run or controlled by a lessee thereof, "in the corporate name of the owner," and not otherwise, such lessee should be liable, jointly or severally with such owner, for stock killed or injured on such railroad, by the cars, etc., thereof, at a place where the same is not, but ought lawfully to be, securely fenced.

SAME.—A railroad run or operated by a lessee thereof in its "own name" is not liable, under such statute, for stock so killed or injured.

SAME.—*Evidence.*—*Pleading.*—*Justice of the Peace.*—In an action commenced before a justice of the peace, against a railroad company, to recover for live-stock alleged to have been so killed or injured by the defendant's

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cars, on the defendant's road, where the same was not, but ought lawfully to have been, securely fenced, the defendant may prove, without plea, in bar of the action, that such road was, at the time of such killing or injury, owned by another railroad company, but was being run by the defendant, as lessee, in her own name.

From the Blackford Circuit Court.

N. O. Ross, for appellant.

E. Pierce and *W. March*, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellant, as defendant, before a justice of the peace of Blackford county, to recover the value of certain stock killed by the appellant.

From the judgment of the justice, the cause was appealed to the court below.

Appellee's complaint was in two paragraphs. The first paragraph was for killing a sheep, and the second paragraph was for killing a steer.

In both paragraphs, the appellee alleged, that the stock was killed at a point on appellant's railroad, where said railroad was not securely fenced in, but could and ought lawfully to have been fenced. In the court below, the cause was tried by the court; and the court found for the appellee, assessing his damages at twenty-five dollars. On written causes filed, the appellant moved the court below for a new trial, which motion was overruled, and appellant excepted. And judgment was rendered upon the finding, in favor of the appellee and against the appellant.

In this court, the alleged error of the court below, assigned by appellant, is the overruling of appellant's motion for a new trial.

In this motion, the following causes were assigned by appellant for such new trial:

"1. The finding of the court is not sustained by sufficient evidence;

"2. The finding of the court is contrary to law;

"3. The damages are excessive;

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"4. The court erred in refusing to allow the defendant to prove, that the railway company, running and operating the railway on which the animals were killed, as charged in plaintiff's complaint, was not owned by the defendant, nor operated in the name of the owners thereof, but was running and operating said railway in its own corporate name, by a lease from the said owners of said railway for a term of years."

It appears by a bill of exceptions, which is properly in the record, that at the proper time the appellant offered to prove, "that at the time of the killing of the animals, complained of in the complaint of plaintiff, the defendant was not the owner of the railroad, on which said animals were alleged to have been killed, but that the said railroad then was, and still is, owned by the Columbus, Chicago and Indiana Central Railway Company; and this defendant was not, at the time of the killing of said animals, running and controlling said railroad in the name of the said Columbus, Chicago and Indiana Central Railway Company, but in the name of this defendant; to the introduction of which evidence, the plaintiff objected, which objections were by the court sustained, to which ruling of the court the defendant at the time excepted."

The important question in this case for our consideration is this: Was this offered evidence properly excluded by the court below? If it was, then, in our opinion, the finding of the court on the evidence admitted ought not to be disturbed, and the judgment must be affirmed. But if the court below erred in the exclusion of the evidence offered by appellant, then, for that cause, the judgment of that court must be reversed.

The appellee's causes of action against the appellant, as stated in his complaint, are purely statutory. If we had no such statute in this State, as the act entitled "An act to provide compensation to the owners of animals killed or injured by the cars, locomotives, or other car-

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riages of any railroad company in the State, and to enforce the collection of judgments rendered on account of the same, and to repeal all laws inconsistent therewith," approved March 4th, 1868, it is perfectly clear, that the facts stated in appellee's complaint would not give him any cause of action whatever.

It is provided by the first section of said act, as follows:

"That lessees, assignees, receivers, and other persons, running or controlling any railroad in the corporate name of such company shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act." 1 R. S. 1876, p. 751.

The plain meaning of this section is, that where a leased railroad is run or controlled by the lessee thereof, in the corporate name of the owner of such railroad, such lessee shall be liable, jointly or severally with such owner, for stock killed or injured, etc.

In this case, the evidence offered by the appellant, and excluded by the court below, would have tended to prove that the appellant was the lessee of the railroad on which the appellee's stock were killed, and were running and controlling said railroad, at the time said stock were killed, in the appellant's own corporate name, and not in the corporate name of the owner of said railroad.

If these facts were true, which the evidence offered tended to prove, the question arises, was the appellant liable to the appellee for the killing of his stock?

It is clear, we think, that the case thus made would not come within the plain language of the statute, and without the statute there was and could be no liability. The statute does not make every lessee of a railroad liable, in any event, for stock killed or injured on the line of the leased railroad which is not securely fenced; but it is the lessee, which runs and controls the leased railroad in the

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corporate name of the owner of such railroad, which is subjected to such liability.

In each of the paragraphs of appellee's complaint, the railroad on which his stock was killed is described as appellant's railroad.

As the action was commenced before a justice of the peace, the matter of defence relied upon by the appellant was admissible in evidence, without plea or answer.

Our conclusion is, that the evidence offered by the appellant, and excluded by the court below, was material and competent, and that, if the facts were as this evidence would tend to prove they were, the appellant would not be liable to the appellee, under the statute, for the killing of his stock, as alleged in his complaint. *The Cincinnati, etc., R. R. Co. v. Paskins*, 36 Ind. 380; *The Cincinnati, etc., R. R. Co. v. Townsend*, 39 Ind. 38.

For the reasons given, in our opinion the court below erred, in overruling the appellant's motion for a new trial.

The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded for a new trial, and for further proceedings.

Opinion filed at May term, 1877.

Petition for a rehearing overruled at November term, 1877.

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THE PITTSBURGH, CINCINNATI AND ST. LOUIS R. W. Co. v.
VANDYNE.

RAILROAD.—Passengers.—Regulations Concerning.—Purchase and Exhibit of Ticket.—A railroad company may establish and enforce a regulation requiring a person desiring passage on its trains to procure, and to exhibit to its employees, before entering its cars, a ticket entitling him to such passage.

SAME.—Intoxication of Passenger.—A railroad company may refuse to receive

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and carry as a passenger any person who is so intoxicated as to be disgusting, offensive, disagreeable or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage.

~~SAME.~~ Slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify a railroad company in refusing to receive and carry him. /

From the Pulaski Circuit Court.

N. O. Ross, for appellant.

G. T. Wickersham, S. E. Perkins, Jr., and F. M. Trissal, for appellee.

BIDDLE, C. J.—The complaint of the appellee, against the appellant, avers, that the appellant was operating their railroad, running from Winamac, in Pulaski county, to Logansport, in Cass county; that they were common carriers of passengers; that he purchased a ticket for a passage from Winamac to Logansport; that when he applied for entrance and tried to go into the appellant's passenger car, he was prevented by the employees of the road, expelled therefrom, and thrown down upon the platform, etc.

There is a second paragraph of complaint substantially the same as the first.

The sufficiency of each paragraph was tested by a demurrer, and, as we think, very properly held good. We do not, however, state any more of the complaint than is necessary to show the application of the subsequent proceedings to its allegations.

The complaint was answered by three paragraphs:

First. A general denial.

Second. "That, at the time of the committing of the supposed grievances complained of in the complaint, the defendant had established a rule requiring all passengers, before entering its cars, to procure, and exhibit to its employees having charge of the train, a ticket showing the prepayment of the fare to the point of destination of such

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passenger; and that no person was entitled to enter its cars without complying with said rule; that, at the time complained of, the plaintiff failed to show any such ticket, upon being requested so to do by the employees of the defendant, and he was, for that reason, excluded from the car by the servants of the defendant, as of right he might be. And the defendant denies all charges of ill-usage or maltreatment in the complaint alleged, other than refusing him admission upon the train aforesaid; and the defendant denies that he offered to pay the conductor his fare before entering the train."

Third. That, at the time the plaintiff applied for admission into the defendant's cars, as alleged in the complaint, he was intoxicated, and, by such intoxication, in his crippled condition, was rendered unfit to enter the defendant's cars, and unsafe to be received as a passenger, and that he was excluded from entering the defendant's cars for that reason; and the defendant denies all improper conduct on the part of her employees.

Demurrers were filed to the second and third paragraphs of answer, and sustained, and exceptions reserved.

A jury trial was had upon the issue of the general denial, and a verdict found for the appellee, a motion for a new trial overruled, exception reserved, and appeal taken to this court.

We have frequently held, that railroad companies have the right to make proper regulations for the management of their engines, trains, cars, etc., and the manner of receiving and carrying passengers, when such regulations are reasonable and not inconsistent with their charters, nor against general law; and we think the regulations set up in the second paragraph of the answer are reasonable, and within the power of the company to make. It is the duty of passengers to conform themselves reasonably to such rules when ascertained; if they do not, and are injured by their own negligence, without the fault of the company, they have no remedy. *The Pittsburgh, etc., R.*

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R. Co. v. Van Houten, 48 Ind. 90; *The Pittsburgh, etc.*, *R. W. Co. v. Nuzum*, 50 Ind. 141; *The St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566; *The Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Falkner v. The Ohio, etc., R. W. Co.*, 55 Ind. 369.

According to these authorities, and upon sound legal principles, we must hold the second paragraph of answer sufficient to constitute a defence to the action.

The appellant also insists, that the third paragraph of his answer is sufficient. A railroad company is not bound to receive any person as a passenger who is drunk to such a degree as to be disgusting, offensive, disagreeable, or annoying; and a person so drunk as to be likely to violate the common proprieties, civilities, and decencies of life, has no right to a passage while in that condition. The comfort and convenience of passengers generally must be protected, their opinions and feelings regarded, and proper decorum observed; and although, in a railroad passenger car, neither the highest breeding of the drawing-room, nor the fastidious delicacy of the parlor, is required, yet the behavior of all persons therein should be becoming to the place and the general character of the passengers. Slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated, would not be sufficient ground to refuse him passage in a public car, although his behavior might not be in all respects strictly becoming.

The legal principle upon which the third paragraph of the answer is founded is correct, but the facts are not very carefully pleaded. The degree of intoxication is not clearly and fully stated. The allegations, that the appellee, by such intoxication, in his crippled condition, was rendered unfit to enter the defendant's cars, and unsafe to be received as a passenger, are rather conclusions from facts, than the facts from which the conclusions are drawn. Perhaps the appellee might have had the facts stated in the paragraph made more specific on motion, but, as he

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did not see proper to do so, we think they are sufficiently alleged to withstand a demurrer.

In our opinion, the court erred in sustaining the demurrers to the second and third paragraphs of answer.

Other questions, touching the rejection of certain evidence offered and rejected, and giving and refusing to give certain instructions to the jury, are presented in the record, but we need not examine them. They will probably not arise again, but, if they should, our views upon the demurrers to the third and fourth paragraphs of the answer will indicate the proper ruling upon the instructions.

The judgment is reversed, at the costs of the appellee, and the cause remanded for further proceedings.

MORGAN, ADM'R, v. SACKETT.

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149	290

DECEDENTS' ESTATES.—Assets.—Payment of Debts.—Duty of Administrator.—Real Estate.—Rights of Widow.—Mortgage.—An insolvent debtor, the owner of certain real estate encumbered by a mortgage for purchase-money in which his wife had not joined, died intestate, leaving her surviving him, and leaving personal property in excess of the amount allowed by law to his widow, and of the amount necessary to discharge the expenses of administration, his last sickness and his funeral. The administrator, having in his hands such excess, suffered such real estate to be sold on foreclosure of such mortgage, whereupon the widow brought suit against him to require him to pay to her the one-third value of such real estate.

Held, that she is entitled to a judgment for one-third of such excess, not exceeding however the one-third value of such real estate.

Held, also, that the fact that she did not join in such mortgage, and had not relinquished her interest in such realty, is no defence to such action.

Held, also, that the fact, that such mortgage was given for purchase-money, was no excuse for the failure of the administrator to protect her interest therein.

From the Bartholomew Circuit Court.

Morgan, Adm'r, v. Sackett.

A. Burns and J. Morgan, for appellant.

P. W. Jerrett, for appellee.

BIDDLE, C. J.—The appellee filed the following complaint against the appellant:

“Maud Sackett complains of John W. Morgan, as the administrator of the estate of Lee M. Sackett, deceased, and says, that the plaintiff was married to the said Lee M. Sackett on the 22d day of July, 1868, and that he died on the 22d day of August, 1878, leaving her his widow, surviving him; that he died intestate, and that his estate is insolvent. She further shows, that he left personal property of the value of one thousand dollars, which came into the hands of the defendant as his administrator, and real estate, to wit, lot number thirteen (13) in the town of Jonesville, in said county and State, of the value of four hundred and fifty dollars. Said plaintiff further shows, that, at the time of the death of said Lee M. Sackett, said real estate was mortgaged for the purchase-money therefor, and that afterward said mortgage was duly foreclosed, and said lot sold for the sum of three hundred and sixty-seven dollars, to satisfy the same.

“Said plaintiff says, that it was the duty of said administrator, after paying her the sum of five hundred dollars allowed her as widow, and the expenses of the last sickness, funeral expenses, and the expenses of the administration, to apply the balance of the personal estate in satisfaction of said mortgage, that her one-third interest might be released therefrom. She states, that he has failed so to do, but suffered said property to be sold to satisfy the judgment on said mortgage, and is holding the balance of said assets, to wit, three hundred dollars for division among the general creditors of said estate.

“She prays that he may be required to pay to her the sum of one hundred and fifty dollars, the one-third of the value of said lot, and for all further and proper relief.”

To this complaint, a demurrer, alleging the insuffi-

Morgan, Adm'r, v. Sackett.

ciency of the facts stated, was overruled, and exceptions to the ruling reserved.

The appellant then answered as follows:

"The defendant, for answer herein, says, that he admits that plaintiff was the wife of said decedent, and that he died the owner of said property, but says, that, prior to his death, said decedent executed a mortgage upon said property for the balance of the purchase-money for said property; that said plaintiff did not join in said mortgage with her husband.

"Defendant avers, that, by reason of the depreciation of the value of said property, the same was not worth more than the amount of said mortgage, and that there never came into his hands as administrator an amount sufficient to discharge said mortgage, after paying to plaintiff five hundred dollars, her absolute claim, and costs of administration and funeral expenses; that said estate is insolvent, and has been so declared by said court. Defendant avers, that said plaintiff never relinquished any right or interest in said property by reason of said mortgage."

A demurrer to this answer, alleging a want of facts stated, was sustained, and exceptions reserved. The appellant refusing to answer further, the court decreed one hundred and fifty dollars to the appellee, as prayed.

This judgment is correct. It is the duty of an administrator to pay the claims against the estate of the decedent, in the following order:

First. Expenses of administration.

Second. Expenses of last sickness, and funeral expenses.

Third. Judgments which are liens upon the decedent's real estate, and mortgages of real and personal property existing in his lifetime.

Fourth. General debts. Sec. 109, 2 R. S. 1876, p. 534.

It was the duty of the appellant, after he had paid the first and second classes of claims, to apply whatever assets were left upon the payment of the mortgage. Not having

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done so, and having allowed the lot to be sold to pay the mortgage, the widow is entitled to the same portion in such assets as she would have had in the lot, if the assets had been applied so far in discharge of the mortgage. Former decisions of this court bear us out in this view. *Perry v. Borton*, 25 Ind. 274; *Newcomer v. Wallace*, 30 Ind. 216; *Kirkpatrick v. Caldwell's Adm'r*, 32 Ind. 299; *Hunsucker v. Smith*, 49 Ind. 114.

It is insisted by the appellant, that "a mortgage given for purchase-money is superior to any rights of a widow in the real estate." Undoubtedly it is, in favor of the mortgagee, in all cases; but in so far as the mortgage has been paid, or there are assets out of which it should be paid, either in whole or in part, the widow has, to that extent, a right therein.

The appellant also insists, that, if the widow is entitled to have the personal assets applied on the payment of the mortgage, it is only upon the ground that she has relinquished her right in the real estate by joining her husband in the mortgage; and, not having done so in this case, she is not entitled to any share in the assets, in preference to the payment of the general debts against the estate.

We do not perceive the force of this argument. How the fact, in such case, that she had joined or not joined with her husband in the mortgage, could affect the order of the payment of the claims against the decedent's estate, does not appear to us.

It does seem to us, however, that the decree should have been for one-third of the three hundred dollars' surplus assets, in the hands of the administrator, instead of one-half; but, as no question was raised in the record to reach this point, we can not examine it.

The judgment is affirmed, with costs.

Manchester v. Dodge.

MANCHESTER v. DODGE.

PRACTICE.—Agreed Case.—Affidavit.—Jurisdiction.—Where, under section 386, (2 R. S. 1876, p. 190,) of the practice act of this State, an agreed case is submitted by the parties, to a court, for decision, "it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties," or the court will have no jurisdiction of the case.

SAME.—Evidence.—Agreed Statement of.—Where, in an action put at issue by the filing of pleadings, an agreed case is submitted by the parties, but the affidavit required by section 386 of the practice act is not filed therewith, such agreement can only be regarded, at most, as an agreed statement of evidence, and, if such evidence fails to sustain the material allegations of the complaint, a finding must be made for the defendant.

SAME.—New Trial.—Supreme Court.—The correctness of the finding on such agreed statement of evidence can be questioned only by a motion for a new trial, and, if no such motion be made, no question as to such finding is presented to the Supreme Court, on appeal.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

R. M. Johnson, and *J. D. Osborn*, for appellee.

Howk, J.—The appellant, as plaintiff, sued the appellee, as defendant, in this action, in the court below.

In her complaint, the appellant alleged, in substance, that her husband, William J. Manchester, held two notes executed by the appellee, to E. F. Dodge, Guardian, dated April 8th, 1867, for the sum of five hundred and fifty dollars each, one due in three and the other in six years from date, each drawing interest from two years after date, and waiving valuation and appraisement laws, and payable at the First National Bank of Goshen, Indiana; that said two notes were received by her husband, as appellant's agent; that on the 2d day of January, 1872, her said husband, by the name of John Manchester, recovered a judgment in the court of common pleas of Elkhart county, against the appellee for six hundred and forty dollars and twenty cents, and costs, on the first of said two

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120	122
57	584
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notes; that on the 17th day of April, 1873, the second of said notes being due and unpaid, and said judgment also unpaid, her said husband made and entered into a composition and compromise with the appellee, the appellant consenting thereto, by which her husband agreed that the appellee should pay the appellant the sum of eight hundred dollars, in notes, in full settlement of said judgment and costs and of said second note, on which there was then due the sum of fourteen hundred dollars; that said composition, compromise and settlement were brought about by the fraudulent representations of the appellee, that he had no property subject to execution, or that could be reached by process of law, that he owned no property, rights, credits or choses in action, except two hundred dollars' worth of household goods which were exempt from execution, and especially that his brother, Peleg S. Dodge, was not in any manner indebted to him, and that he had not transferred his property to said Peleg S. Dodge, with the intent to cheat, hinder or delay his creditors; that both the appellant and her said husband, believing and relying on said representations, were thereby induced to compromise and settle said claim as above set forth; that each and every one of said representations were known to be false by the appellee, and that his brother, Peleg S. Dodge, then owed him a large sum of money, and that appellee was then worth five thousand dollars, and had his property covered up in the name of said Peleg S. Dodge, and that he had since, to wit, on September 1st, 1873, received back from said Peleg S. Dodge, five thousand dollars' worth of personal property, and caused five thousand dollars' worth of real estate, belonging to him, to be conveyed by said Peleg S. Dodge to the appellee's wife; and that the appellant held a written assignment of said claims from her husband, which was filed with said complaint; wherefore appellant averred, that she was damaged in the sum of six hundred dollars by the said false and fraudulent representations of the

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appellee, and that she had been to other great trouble and expense in employing counsel and attending court, and hence she asked for a judgment for exemplary damages in the sum of one thousand dollars, and for all other relief.

To this complaint the appellee answered, in substance, that he admitted the execution of the notes dated April 8th, 1867, as alleged in the complaint, but he averred that the same had been, and were, long prior to the alleged compromise and composition, fully paid, satisfied and discharged.

And, in the second paragraph of his answer, the appellee alleged, in substance, that he admitted the execution of said notes dated April 8th, 1867, but he averred, that the appellant ought not to recover in this action, because he said that said notes were secured by a mortgage executed by him, at the same date, upon his interest in certain real estate, a copy of which was filed with said paragraph, the appellee at the time being the owner of an interest in said real estate, as the heir at law of ——— Dodge, deceased; that afterward, on the 28th day of April, 1867, the appellee by deed, without warranty, a copy of which was therewith filed, conveyed his interest in, and delivered, said real estate so mortgaged to the appellant, who had knowledge of said mortgage which was then upon record, and who, with her husband, said William J. Manchester, thereafter executed a warranty mortgage upon all said lands to the appellee and others to secure the payment of a debt of three thousand five hundred dollars, as therein stated, a copy of which mortgage was therewith filed; that thereafter, the payees of said debt and mortgage sold and assigned the same to Alexander Pope, who thereafter, at the March term, 1870, of the court below, sued the appellant and her said husband upon said debt, and foreclosed the said mortgage against them, and such proceedings were therein had as that a decree of foreclosure was duly entered

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in said court upon said mortgage, and the said real estate was by the court decreed to be sold to pay said debt, a copy of which decree and judgment were therewith filed; that afterward, the appellant failing to pay said mortgage debt, such proceedings were therein had as that an order of sale was duly issued by virtue of said decree, and all said land was, by the sheriff of said county, duly sold by virtue thereof to said Pope, and, the appellant failing to redeem said land from said sale, the said sheriff duly executed to said Pope a deed conveying said lands to him by virtue of such decree and sale, whereby the said lands became and were chargeable in said Pope's hands as a fund for the payment of said debt and mortgage, evidenced by said notes dated April 8th, 1867, so due to said E. F. Dodge; that thereafter, on the 31st day of August, 1871, the said Pope, so being the owner of said lands, paid off the said notes and debt to said E. F. Dodge, whereupon said Dodge, without any consideration therefor, endorsed said notes to said Pope without recourse on himself, and executed a release of said mortgage, which was duly recorded; that thereafter the said Pope, still being the owner of said lands, without any consideration, transferred said notes to William J. Manchester, the appellant's husband, without recourse on himself, and said William J. transferred the same, without any consideration paid to the appellant; and that such payment by Pope operated as a release and discharge of the debt, and the appellant was estopped, by her mortgage and the deed to her, from enforcing payment from the appellee; wherefore, etc.

To this answer, the appellant replied in two paragraphs, as follows:

1. A general denial; and,
2. The appellant admitted, that the appellee executed the notes and mortgage mentioned in said answer, and that appellee was the owner of the real estate mentioned in said mortgage; and that the appellee, on the 28th day

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of April, 1867, sold and conveyed said land to the appellant by deed, a true copy of which was set forth in said answer; but the appellant said, that said deed appeared, on its face, to be a warranty deed with general covenants, and bound the appellee to pay off said first mentioned encumbrance; and the appellant also admitted, that she and her husband gave back a mortgage on said land to secure the purchase-money, and that said mortgage and debt were assigned to Pope and foreclosed, and the title to said land divested, as set forth in said answer; and she says, that, after said Pope became invested with said title by foreclosure, he purchased and took an assignment of said notes of April 8th, 1867, and thereupon, to clear up the title to said lands, released said mortgage, holding the notes against the appellee personally; and that, in consideration that the appellant would and did make to him, said Pope, a deed for said land, he assigned said notes by endorsement without recourse to the appellant; and she denied all other allegations in said answer, not admitted or controverted in said reply.

And the action, being at issue, was submitted to the court below for trial, upon an agreed statement of facts; and the court found for the appellee, "to which conclusion of law from said facts" the appellant excepted.

And judgment was rendered by the court below, upon its finding, for the appellee, from which judgment this appeal is now prosecuted.

In this court, the only alleged error assigned by the appellant is, that the court below erred in its conclusion of law upon the agreed statement of facts.

To the proper consideration of the questions presented by this alleged error, a summary at least of this agreed statement of facts is almost indispensable; and we therefore give this summary, making it as brief as we can, with the view, at the same time, of making it intelligible.

"It is admitted," that the appellee executed the two notes of five hundred and fifty dollars each, dated April 8th,

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1867, as alleged in the complaint, secured by the mortgage, as set forth in the answer, which mortgage was recorded before the sale hereinafter mentioned; that the appellee and wife conveyed his interest in the land so mortgaged to the appellant, by deed dated April 27th, 1867, whereby they "convey and warrant" unto the appellant "all their right, title and interest in and to" said land; and that, on the same day, the appellant and her husband executed and delivered back to the appellee a mortgage on said land to secure part of the purchase-price of said land; that the appellee owned an undivided interest of said land, as the heir at law of ——— Dodge, then deceased, and that the appellant had bought the undivided interest of the appellee's brothers, James S. and Peleg S. Dodge, and gave back said mortgage to appellee and his said brothers, to secure their several claims; that said mortgagees, appellee and his said brothers, sold and transferred said mortgage and the notes secured thereby to Alexander Pope, who proceeded, in due form of law, to foreclose said mortgage; that said lands were sold, in due form of law, on said foreclosure, and were purchased by said Pope for the full amount of said debt, and were not redeemed, and that said Pope became invested with the legal title to the same by virtue of such sale and their non-redemption; that, after said Pope so became vested with the legal title, for the purpose of clearing the title to said lands, he paid off said notes made by appellee April 8th, 1867, and took an assignment of the same, they being secured by a mortgage on said land, (the interest of appellee in said land,) given by appellee at the date thereof, and prior to the sale of said land to the appellant; that said Pope, after he so became the holder of said notes of April 8th, 1867, and the mortgage securing them, released said mortgage in writing of record, with the express stipulation in said release stated, that he wished to hold said notes without security; that afterward said Pope, in consideration that appellant and her husband would and did

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make him a quitclaim deed to said land, endorsed said notes to the appellant without recourse.

"It is agreed, that if, upon the above facts and evidence, said notes of April 8th, 1867, became an equitable charge on said lands, to be charged on them before resorting to defendant, either in the hands of plaintiff or said Pope, the defendant should recover; if, on the contrary, they did not become a charge on said land, and not paid in contemplation of law by said transfer and mortgage, the plaintiff is entitled to recover the face of said notes and interest, less a payment of eight hundred dollars, made April 17th, 1873."

It appears from a bill of exceptions which is properly in the record, that this cause was submitted to the court below for trial, not alone upon the "agreed statement of facts," but also upon what is termed "documentary evidence," referred to therein.

The case, as presented by the record, is rather an anomalous one. It is not an agreed case under our code of practice, for it does not "appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties." 2 R. S. 1876, p. 190, sec. 386.

In the case of *Sharpe v. Sharpe's Adm'r*, 27 Ind. 507, it was held by this court, that such an affidavit was necessary to give the court jurisdiction of the case. And, indeed, it could not well be held otherwise, for the language used in section 386, *supra*, is imperative. "It must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties."

Now, if we consider what is termed an agreed statement of facts as merely an agreed summary of the facts which the evidence would have established on a trial of the issues joined between the parties; if, in other words, we consider that the issues in this cause were submitted to the court below for trial, upon the evidence contained in

the agreed statement of facts and the documentary evidence, we are met with other difficulties.

Appellant's cause of action, as stated in her complaint, is the alleged false and fraudulent representations of the appellee, whereby the appellant was induced to compound and compromise the appellee's two notes of April 8th, 1867. Appellant has sued for damages resulting from these alleged representations, and for exemplary damages. She has not sued upon the notes, nor has she sought to have the alleged compromise of the notes set aside or declared null and void. But the gist of her complaint in this cause is, as before stated, the alleged false and fraudulent representations of the appellee, the damages she has sustained thereby, and the exemplary damages, for the recovery of which she has demanded judgment.

Very singularly, as it seems to us, the appellee's answer in this action is not responsive to the appellant's complaint.

The first paragraph of this answer is a general plea of payment of the notes of April 8th, 1867, long prior to the alleged composition and compromise; and the second paragraph of the answer, as we view it, is a special plea of payment, giving in detail the circumstances of such payment. But in neither paragraph of his answer was there even the slightest allusion by the appellee to the alleged false and fraudulent representations, wherewith he was charged by appellant, and which constituted the gravamen of her complaint.

It is evident, therefore, that, for some reason which is not clearly apparent, the appellee chose to consider the appellant's complaint in this action as a complaint on the two notes of April 8th, 1867, and answered it accordingly.

Now, if we consider the agreed statement of facts in this case as merely an agreed statement of the evidence on which this cause and the issues joined therein were

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submitted to the court below for trial, it is manifest that this evidence would not sustain the averments of appellant's complaint. For, in this agreed statement, there is no mention of, or reference to, any false and fraudulent representations, or representations of any kind, of the appellee, whereby the appellant was induced to compound and compromise the two notes of April 8th, 1867. Indeed, this alleged composition and compromise are not mentioned, nor in any way alluded to, in the agreed statement of facts or evidence.

It would seem, that when this agreed statement was prepared, the parties had either forgotten what the appellant had sued for in this action, or else they then and thereby intended to submit to the court below for trial a cause of action entirely different from the one stated in appellant's complaint.

We incline to the opinion, that the parties did intend, by their agreed statement of facts, to submit to the court for trial a different cause of action from the one stated in appellant's complaint; and, if this statement had been accompanied by the affidavit required by section 386 of the practice act, *supra*, we might perhaps have considered it as a new and independent action.

As we can not, however, regard this as an agreed case, under our code, we have looked at it in what we consider the most favorable light for the appellant, and, viewed in this light, we are constrained to say, that, in our opinion, the court below did not err in the decision of this cause. For there was not a single item of fact or evidence adduced before the court below which tended, even remotely, to sustain the material averments of the appellant's complaint.

We have hitherto considered this case as if the alleged error assigned by the appellant fairly presented the questions before us; but this may well be doubted. It is true, that in an agreed case, properly prepared and submitted, under the requirements of section 386 of our practice act,

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supra, we have held, that no motion for a new trial is necessary, and that a mere exception by the losing party to the decision of the court below, and the assignment of such decision as error in this court, would present the questions of law involved for our consideration. *Fisher v. Purdue*, 48 Ind. 323. But where, as in this case, the agreed statement of facts, for the want of the requisite affidavit, must be considered, if considered at all, as merely an agreed statement of the evidence, we incline to the opinion, though we need not now decide, that a motion for a new trial would be necessary, as in other cases.

Our conclusion in this case is, that there is no available error in the record, of which the appellant can complain.

The judgment of the court below is affirmed, at the appellant's costs.

Opinion filed at May term, 1877.

Petition for a rehearing overruled at November term, 1877.

MURPHY ET AL. v. HENDRICKS.

MORTGAGE.—*Description.*—*Real Estate.*—*Action to Quiet Title.*—*Conveyance.*—*County Auditor.*—A mortgage to the State, executed for a loan of school funds, simply described the premises mortgaged by subdivisions, without naming the county and State wherein they were located.

Held, in an action by the mortgagor, to quiet his title, against a purchaser of the mortgaged premises at a sale thereof by the county auditor, that the mortgage is void for uncertainty in the description of such premises, and, therefore, that such sale by the auditor was a nullity, and vested no title in the purchaser.

SAME.—*Congressional Survey.*—*Judicial Notice.*—The congressional survey of the lands lying north-west of the Ohio river, under the various acts of Congress, is part of the public law, of which the courts of this State must take notice.

From the Grant Circuit Court.

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Murphy *et al.* v. Hendricks.

A. Steele and *R. T. St. John*, for appellants.

J. F. McDowell, *G. McDowell*, *J. Brownlee*, *H. Brownlee* and *I. VanDevanter*, for appellee.

BIDDLE, C. J.—Hiram K. Hendricks brought this action to quiet the title to certain lands, described in the complaint, to which it was alleged Miles E. Murphy and William White claimed adverse title.

Issues were formed, and the case tried by the court, and a finding had in favor of appellee.

Judgment on the finding, and appeal to this court.

The sufficiency of the evidence to sustain the finding is properly presented, and we come to the question at once, as we think it is decisive of the case.

The evidence shows a title to the land described in the complaint in the appellee; that, while he was owner of the land, he executed a mortgage to the State of Indiana, to secure a note given for a loan of school funds.

The mortgage was in the following words:

“We, Hiram K. Hendricks, of the county of Grant, and State of Indiana, for the use of the school funds, mortgage to The State of Indiana all of the east half of the south-west quarter of section two, of township No. twenty-five north, of range No. seven, (to wit,) for T. 25, R. 7 E., \$84.00, and for Sinking Fund, \$76.00. Total, \$160.

“For the payment of one hundred and sixty dollars, with interest at the rate of seven per cent. per annum, payable in advance, according to the conditions of the note hereto annexed.

“In testimony whereof, we have hereunto set our hands and seals, the 11th day of October, 1862.

“WILLIAM K. HENDRICKS. (Seal.)”

Then follow the note, the certificate of the clerk and recorder that “the land described in the foregoing mortgage” is not encumbered, the oath of the mortgagor “that he is the legal owner of the premises mentioned in the mortgage,” and that there is no encumbrance upon

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them, then the acknowledgment of the mortgage by the mortgagor before the auditor.

On failure of the mortgagor to pay certain instalments of interest due on the note secured by the mortgage, the auditor advertised and sold the land to the appellants, and the title derived from this sale was the only title shown by the evidence to be in appellants.

We are of opinion, that the mortgage made by the appellee is void for uncertainty in the description of the land, that it conveyed no title to the State, and that the sale by the county auditor conveyed no title to the appellants. Admitting that the land, as to the township and range, is sufficiently described in the mortgage, it nowhere states in what county or state the land is situated.

The case falls strictly within the principle of the case of *Cochran v. Utt*, 42 Ind. 267.

The appellants insist, that the description of the land in the mortgage can be made sufficiently certain by reference to the certificate of the clerk and recorder, and to the affidavit of the mortgagor; but in this they are mistaken. Both the certificate and affidavit simply refer to the land described in the mortgage; and, there being no sufficient description in the mortgage, there is none in the certificate and affidavit. Besides, there is no reference in the mortgage to any other paper, by which the description of the land could be made certain. It therefore does not fall within the rule, that that is certain which can be made certain.

The vast territory lying north-west of the Ohio river was surveyed upon a system of base and meridian lines, under various acts of Congress, and this congressional survey is part of the public law which we must notice.

Without naming the state or county, or without something by which the state and county could be ascertained, the description of the land in this mortgage would be just as applicable to the same township and range, in reference to any other base and meridian line, in the several

The State v. Wickey *et al.*

states north-west of the Ohio river, as it is to the base and meridian lines by which the survey of the lands in the State of Indiana were made. It is impossible to ascertain, therefore, from the face of the mortgage, or from any thing to which the mortgage refers, in what state or county the land described therein lies. As the mortgage is the basis of title in the appellants, we think it too uncertain to uphold their claim.

In addition to the case cited, which we regard as being in point, the following authorities fully support the same principle: *Porter v. Byrne*, 10 Ind. 146; *The Eel River Draining Association v. Topp*, 16 Ind. 242; *Munger v. Green*, 20 Ind. 38; *Gano v. Aldridge*, 27 Ind. 294; *Key v. Ostrander*, 29 Ind. 1; *The German, etc., Ins. Co. v. Grim*, 32 Ind. 249; *Harding v. Strong*, 42 Ill. 148; and 3 Washburn Real Property, 4th ed., pp. 384 to 412.

We think the decree of the court is correct.

The judgment is affirmed, with costs.

THE STATE v. WICKEY ET AL.

LIQUOR LAW.—Sale without License.—Indictment.—Duplicity.—An indictment charged, that the defendant, "not being then and there licensed according to the laws of Indiana," etc., unlawfully sold intoxicating liquor, in a less quantity than a quart at a time, "to be then and there drunk," etc., on the premises of the defendant.

Held, on motion to quash, that the indictment is not bad for duplicity.

Held, also, that the indictment sufficiently avers that the defendant was not licensed to sell intoxicating liquors.

From the Allen Criminal Circuit Court.

S. M. Hench, Prosecuting Attorney, for the State.

Howk, J.—The appellees were indicted by the grand jury of the court below, at its October term, 1876.

The indictment charged, in substance, that on the 20th

day of October, 1876, at Allen county, Indiana, the appellees, "they not being then and there licensed, according to the laws of Indiana, in force at the time," unlawfully sold to John Downey intoxicating liquor, in a less quantity than a quart at a time, to wit, the quantity of two gills, at and for the price of ten cents, "to be then and there drunk and suffered to be drunk in the house, out-house, yard and garden" of the appellees, "situate in said county, and in the appurtenances then and there and thereto belonging."

On motion of the appellees, this indictment was quashed by the court below, and to this decision the State excepted, and appealed therefrom to this court. The only question, therefore, for our consideration in this case is this: Did the court below err in sustaining the appellees' motion to quash the indictment?

We have no brief from the appellees in this court, and, therefore, our only information in regard to their objection to the sufficiency of the indictment is derived from the argument of the cause in this court by the prosecuting attorney of the court below. These objections may be thus stated:

1. Duplicity, in that the indictment charges two distinct offences in a single count; and,

2. Uncertainty as to which one of two offences it was intended to charge the appellees with.

As to each of these objections, the decision of this court in the case of *The State v. Wickey*, 54 Ind. 438, is decisive of this case.

So far as these objections go, it will be seen, from a comparison of the indictment in this case with the indictment set out in the case cited, that the language used is precisely the same in the two indictments; that these same objections were urged against the indictment in the case cited; and that they were there held to be insufficient and not well taken. And so we hold, on the authority of that case, in the case now before us.

 Thiebaud v. Dufour.

One other objection, it appears, was urged by the appellees in the court below against the indictment in this case, which we will briefly consider.

It was claimed, that after the words, "they not being then and there licensed," in the indictment, the words, "to sell intoxicating liquors," were necessary; and that, as these latter words were not in the indictment, therefore the indictment was not sufficient.

It seems to us, that this objection was not well taken.

The indictment contains the same language, in substance, as is contained in the section of the act under which it was found. It has been repeatedly held by this court, as a general rule, that this was sufficient. And, besides, the meaning of the language used in this indictment is made so plain by its context that the indictment can not be correctly charged with uncertainty on this ground.

In our opinion, the court below erred in sustaining the appellees' motion to quash the indictment in this case.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to overrule the motion to quash, and for further proceedings.

 THIEBAUD v. DUFOUR.

SUPREME COURT.—Appeal.—Judgment.—Trustee.—Report of.—The refusal of the circuit court to confirm a report made by the trustee of an express trust, under a will, is not a final judgment from which an appeal will lie to the Supreme Court, but is merely an interlocutory order.

SAME.—Interlocutory Order.—Statute Construed.—No appeal lies, under section 189 of the decedents' act, (2 R. S. 1876, p. 557,) from an interlocutory order, except as authorized by section 576 of the practice act (2 R. S. 1876, p. 245).

From the Switzerland Circuit Court.

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Thiebaud v. Dufour.

H. W. Harrington, for appellant.

T. Livings, for appellee.

BIDDLE, C. J.—The appellant, trustee of the appellee, under the will of Charles A. Thiebaud, deceased, filed his report in the Switzerland Circuit Court.

The appellee excepted to the report, and filed seven paragraphs of exceptions, upon which the court took the following action:

“And said report, together with said exceptions, being submitted to the court, and evidence heard, the court refused to approve said report, to which refusal the said trustee excepts, and 60 days time is given to file a bill of exceptions.”

This is the only judgment of the court shown in the record. The appellant filed his bill of exceptions within the sixty days, and appealed to this court.

This is not a final judgment. It is a mere interlocutory order, from which no appeal will lie. No appeal will lie from an interlocutory order under section 189 of the decedents' act, 2 R. S. 1876, p. 557, except such as are embraced in section 576 of the practice act, 2 R. S. 1876, p. 245. *Woolley v. The State*, 8 Ind. 377; *Reese v. Beck*, 9 Ind. 238; *Reed's Adm'r v. Reed*, 30 Ind. 313; *Reed v. Reed*, 44 Ind. 429; *Hamlyn v. Nesbit*, 37 Ind. 284; *Goodwin v. Goodwin*, 48 Ind. 584; *Wood v. Wood*, 51 Ind. 141; *Buskirk Prac.* 39, 40.

For want of jurisdiction, the appeal is dismissed, at the costs of the appellant.

The City of Crawfordsville v. Burbridge *et al.*

THE STATE v. WARD.

From the Porter Circuit Court.

T. J. Wood, Prosecuting Attorney, and *C. A. Busbirk*, Attorney General, for the State.

BIDDLE, C. J.—Indictment against the appellee for permitting a minor to play billiards on the appellee's billiard table. This case falls within the principle of *The State v. Ward*, *ante*, p. 537.

The judgment is therefore affirmed.

GOAR ET AL. v. MORARITY.

From the Tipton Circuit Court.

J. W. Robinson, *N. R. Overman*, *R. B. Beauchamp* and *G. Gifford*, for appellants.

J. Green, *D. Waugh*, *J. Waugh* and *N. R. Lindsay*, for appellee.

PERKINS, J.—Complaint to review a judgment.

The complaint, among other things, alleges fraud, etc. It is not sworn to. Enough of the defects existing in the record of the case of *Goar v. Cravens*, *ante*, p. 365, and which were held fatal to the appellant in that case, appear in the transcript in this, to justify its affirmance on the authority of the former.

Judgment affirmed, with costs.

THE CITY OF CRAWFORDSVILLE v. BURBRIDGE ET AL.

From the Montgomery Circuit Court.

W. P. Britton and *M. W. Bruner*, for appellant.

S. C. Willson and *L. B. Willson*, for appellees.

HOWE, J.—In this cause, the same questions are presented for our consideration as those, and only those, questions, which were considered and decided by this court, at the last term, in the case of *The City of Crawfordsville v. Brundage*, *ante*, p. 262. Upon the authority of that case, and for the reasons there given, the judgment of the court below, in this cause, must also be reversed.

The judgment is reversed at appellees' costs, and the cause remanded, with instructions to sustain the appellant's demurrers to both paragraphs of the complaint, and for further proceedings.

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8. *Revocation.*—After arbitrators have commenced their hearing of a cause submitted to them under the statute of this State, (2 R. S. 1876, p. 317,) neither party can revoke his submission. *Shroyer v. Bash*, 349
9. *Same.—Nature of.*—Where the agreement submitting a cause to arbitration is in writing, a revocation of such submission, to be valid, must also be in writing. *Ib.*
10. *Action on Bond.—Damages.*—The measure of damages recoverable in an action upon an arbitration bond is the amount of the judgment confirming the award, with interest and costs, not exceeding, however, the penalty of the bond. *Ib.*
11. *Award.*—The validity of such award can not be impeached, or called in question, in such action. *Ib.*
12. *Same.—Objections to.*—All valid objections to an award must be duly presented, according to the provisions of such statute, at the time when such award is submitted for confirmation by the proper court. *Ib.*
13. *Same.—Action for.*—An action on an arbitration bond, to recover the amount of the award, can not be maintained, until such award has been duly confirmed by the proper court. *Ib.*

14. *Same*.—*Confirmation of*.—A statutory award in this State against a party is not a valid claim against him, until it has been duly confirmed by the proper court. *Ib.*
15. *Pleading*.—The complaint in an action upon an arbitration bond, to recover an award, must aver that such award has been duly confirmed. *Ib.*

ARREST OF JUDGMENT.

See CRIMINAL LAW, 28, 41; PLEADING, 11, 12; REPLEVIN.

ARSON.

See EVIDENCE, 7, 8, 9.

ASSAULT WITH INTENT.

See CRIMINAL LAW, 22, 23.

ASSESSMENT OF TAXES.

See TAXES.

ASSIGNMENT.

See HUSBAND AND WIFE, 1; MORTGAGE, 3, 5, 10.

ASSIGNMENT OF ERROR.

See INSTRUCTION TO JURY, 1; JUDGMENT, 5; PRACTICE, 3, 13; SUPREME COURT, 6, 7, 17, 19, 22.

ATTORNEY.

See BASTARDY; VENDOR AND PURCHASER, 3.

AWARD.

See ARBITRATION, 2 to 6, 11 to 15.

BANKRUPTCY.

1. *Composition*.—Pending a proceeding in bankruptcy, the creditors executed a composition agreement in writing, that "We, the undersigned, creditors of" the defendant, "hereby agree to accept" a certain percentage "on the dollar for our respective claims against him, in full settlement," to be paid in specified instalments, "to be secured by notes, with good approved security; this is to be consummated within thirty days,—otherwise void."
Held, on demurrer, in an action against the debtor by one of such creditors, to recover for his claim, wherein the former had answered such composition agreement and alleged that he had fulfilled the same by executing his notes to the plaintiff, as provided therein, that the answer is insufficient for want of an averment that such agreement had been duly executed as to all such creditors.
Held, also, that such agreement was one between the creditors themselves, as well as between them and the debtor, and, if not executed as to all within the time specified, it became null and void.
Evans v. Gallentine, 367
2. *Instruction to Jury*.—In such action, under the issues formed by such answer, it is error in the court to instruct the jury, that the terms of such agreement might be waived by the plaintiff by a subsequent verbal agreement. *Ib.*

BASTARDY.

Compromise.—Where, pending a prosecution for bastardy, the defendant paid the prosecuting witness a certain sum of money in satisfaction of her claim on account of the support of the bastard child, and the prosecuting witness thereupon signed a written statement that pro-

vision to her satisfaction had been made for the support of said child, in said sum paid her by the defendant, and that she thereby released him from all claim, etc., which statement was placed in the hands of her attorney, with instruction to appear for her and file it in open court, admitting that she had received from the defendant full provision for the support of said child, to her satisfaction, and with the instruction, and upon the agreement of the parties, that said attorney should cause the prosecution to be dismissed; and said attorney afterward filed said statement in open court and moved that the cause be dismissed, but action by the court was postponed for the personal presence of the prosecuting witness, who died before further steps were taken, and after her death said child prosecuted the action by guardian *ad litem*;

Held, that, no admission of the prosecuting witness, or finding of the court, that provision had been made for the support of the child, having been entered of record, and no motion for the entry of record of such admission having been made, in the lifetime of the prosecuting witness, the statute (2 R. S. 1876, p. 660, sec. 17,) was not complied with, and that these facts could not constitute a sufficient answer to the action in favor of said child.

Held, also, that, by the death of the relatrix, the authority of her attorney to act for her ceased. *Harness v. The State, ex rel. Platt*, 1

BILLIARDS.

See CRIMINAL LAW, 41, 42.

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 3; SUPREME COURT, 1, 5, 10, 16.

BILL OF PARTICULARS.

See PLEADING, 2.

BOND.

See STATUTE OF LIMITATIONS, 1, 2.

BRIEF.

See CRIMINAL LAW, 21; SUPREME COURT, 4.

BROKER.

See PRINCIPAL AND AGENT.

BURDEN OF PROOF.

See MECHANIC'S LIEN, 5.

CASES OVERRULED.

Pattison v. Vaughn, 40 Ind. 253, and *Fentriss v. The State, ex rel., etc.*, 44 Ind. 271. *Joyce v. Whitney*, 550

CHALLENGE.

See CRIMINAL LAW, 19; LIQUOR LAW, 11.

CHECK.

See PROMISSORY NOTE, 8 to 8.

CITIES AND TOWNS.

See TURNPIKE, 7.

1. *City.—Pedler*.—Under the provisions of specification 23 of section 53 of the act of March 14th, 1867, (1 R. S. 1876, p. 267,) for the incorporation of cities, a city of this State, organized under such act, has the power to adopt an ordinance restraining any person from peddling

within her limits without having a license so to do, and prescribing a punishment for its violation. *The City of Huntington v. Cheesbro*, 74

2. *Constitutional Law*.—Such ordinance violates no provision of either the State or Federal Constitution. *Ib.*
3. *Pleading*.—A complaint for a violation of a city ordinance need not set out a copy thereof, it being sufficient to refer therein to the number of the section of the ordinance alleged to have been violated. *Ib.*
4. *City*.—*Donation to Railroad*.—*Mandamus*.—In an action by the State, on the relation of the president of a railroad company, against the mayor and common council of a city, for a mandate, to compel the issue and delivery to such company of a certain amount in bonds of such city, the complaint alleged, that a petition was presented to the defendants by a majority of the resident freeholders of such city, representing that such company had been organized for the purpose of constructing a railroad from a certain point to such city, and asking the common council "to make a donation to said company of" a sum specified, to aid "in the construction of the said railroad, to be paid in the bonds of said city, within such time, and at such rate of interest, as" the common council should "deem proper," etc.; that, upon the report of a committee of the common council, that a majority of such freeholders had signed the petition, but without adopting such report, a resolution was adopted by the common council, declaring that such donation should be made, and directing that an ordinance making the same should be prepared; that such ordinance had been defeated; and that such railroad had been completed. A copy of the petition, and also of the proceedings of the council, were made exhibits.
Held, on demurrer, that such copies constitute no part of the complaint, but, having been treated as part thereof by the court below, may be so treated by the Supreme Court, on appeal.
Held, also, that the complaint is sufficient as presenting *prima facie* ground for issuing the writ of mandate demanded.
Held, also, that, under section 60 of the act of March 14th, 1867, (1 R. S. 1876, p. 267,) authorizing the incorporation of cities, etc., a writ of mandate is the only proper remedy in such case.
Held, also, that the petition sufficiently describes the point to which the road was to be completed.
Held, also, no terms upon which such bonds should issue, and no rate of interest thereon, having been specified in the petition, it may be construed as asking the issue of a single bond for the whole amount, without interest, the council having no power to fix a rate of interest.
The Mayor, etc., of Kokomo v. The State, ex rel., etc., 152
5. *Same*.—*Defence*.—The fact, that, at the time such petition was presented, and thence until the commencement of the action for a mandate, one of the members of the common council had been a stockholder and officer of such railroad company, did not disqualify him to act upon the petition, or the common council to pass an ordinance making the donation, and constitutes no defence to the action. *Ib.*
6. *Same*.—*Estoppel*.—The action of the common council, in adopting a resolution declaring that the donation petitioned for should be made, does not estop the defendants, in such action, from denying that such petition had been signed by a majority of the resident freeholders. *Ib.*
7. *Same*.—*Pleading*.—An answer in such action, alleging that such petition had not been signed by a majority of the resident freeholders of the city, is sufficient on demurrer. *Ib.*
8. *Same*.—*Curative Act*.—The act of March 8th, 1875, (Acts 1875, Reg. Sess., p. 92,) legalizing certain acts of the common council of the city of Kokomo, does not apply in this action. *Ib.*

9. *Same.*—Where, in such action, the petition for the donation shows that the railroad is not yet completed, and the donation is asked because the construction of such railroad will enhance the value of the property of the petitioners, an answer alleging a want of consideration for such donation is insufficient. *Ib.*
10. *Same.*—*Fraud.*—*Remonstrance.*—The defendant in such action answered, that the signatures to such petition had been procured by fraud, in that the petition had been signed in blank as to the amount to be donated, upon the representation of the person circulating the petition for signatures, that the blank would be filled by inserting an amount much less than had been afterward actually inserted.
Held, on demurrer, that the answer is insufficient.
Held, also, that such objection should have been presented to the common council by remonstrance.
Held, also, there being no averment in the answer that such representation had been relied on, that petitioners, by so signing in blank, conferred upon the person to whom the petition was by them entrusted an implied authority to fill such blank.
Held, also, that, under such petition, the city would be entitled to receive no stock in such company, and, therefore, that false representations as to the amount of stock to be received by the city were immaterial. *Ib.*
11. *Town.*—*Presumption.*—In an action by a town of this State, it will be presumed, nothing to the contrary appearing, that the plaintiff has been organized under the general law of this State for the incorporation of towns. *The Town of Centerville v. Woods*, 192
12. *Same.*—*Streets and Alleys.*—It is the duty of a town to keep its public streets and alleys in a safe condition for use, in the usual mode, by travellers. *Ib.*
13. *Same.*—In an action against a town, to recover damages for injuries received by a person while travelling on one of her public streets, by reason of a defect therein, it is no defence that such defect was caused by the act of a third person, without the consent of the city. *Ib.*
14. *Same.*—Where, in such case, damages are recovered from the town for such injury, the latter, in an action against such third person, may compel him to repay such damages. *Ib.*
15. *Same.*—Where a third person has unlawfully injured a public street of a town, which he has refused, on demand, to repair, and the same has been repaired by the town, he is liable to the latter for the cost of such repairs. *Ib.*
16. *Same.*—*School Town.*—The character in which an incorporated town may sue or be sued as a school corporation may be designated, either in the title of the action, as a school corporation, or in the complaint by an allegation of the fact. *Town of Noblesville v. McFarland*, 335

COMMON LAW.

See CONTRACT, 1; DECEDENTS' ESTATES, 4, 5; TAXES, 1.

COMMON SCHOOLS.

See CITIES AND TOWNS, 16; TAXES, 1, 4, 5, 6.

CONDITION SUBSEQUENT.

See PLEADING, 17.

CONSTITUTIONAL LAW.

See CITIES AND TOWNS, 2; CRIMINAL LAW, 26; JURY, 1; LIQUOR LAW, 1, 7.

CONSTRUCTION OF STATUTE.

See STATUTE CONSTRUED.

CONTEMPT.

1. *Witness*.—An attachment for contempt of court may be issued for a witness, based solely upon the sheriff's return on a subpoena for such witness, showing the latter to have wilfully refused to permit such subpoena to be served upon him, and his refusal, with knowledge of its nature, to obey the same. *Wilson v. The State*, 71
2. *Same*.—Where, in such case, the witness so attached answers by his affidavit, denying the truth of the matter alleged against him, and setting up a state of facts consistent with his innocence, and that he intended no contempt or interference with the process of the court, he should be discharged; and it is error in the court to proceed to hear evidence as to the truth of the charge and the falsity of the answer. *Ib.*

CONTRACT.

See BANKRUPTCY; INTEREST; MARRIAGE, 1, 2; MECHANIC'S LIEN, 1, 2; PARTNERSHIP, 4; PROMISSORY NOTE, 8; RAILROAD, 2, 3, 4; SPECIFIC PERFORMANCE, 1; STATUTE OF FRAUDS.

1. *Sunday*.—Contracts made on Sunday in this State are void, not at common law, but because they are in violation of a penal statute of this State. *Davis v. Barger*, 54
2. *Same*.—*Promissory Note*.—To an action by the payee, against the maker, on a promissory note, an answer, alleging the signing and delivery of the same on Sunday to a third person or to a co-maker, and averring it to be therefore void, is sufficient. *Ib.*
3. *Same*.—*Principal and Agent*.—Such signing and delivery on Sunday carry with it no implied authority to the person to whom it is entrusted, to deliver the same to the payee. *Ib.*
4. *Same*.—Such signing and delivery on Sunday render the instrument void, though then entrusted to another with instructions to deliver it to the payee on a business day. *Ib.*
5. *Landlord and Tenant*.—*Ejectment*.—During the occupancy of certain real estate by a trespasser, he was notified by the owner, that the rent therefor was a certain sum per annum, which would be demanded as a condition for its further occupancy, but the former, refusing to agree to pay such rent, as being too much, but promising to "make it right," continued his occupancy, though the owner, from month to month, made out and presented bills at a *pro rata* amount of the whole rent demanded, payment of which was refused.
Held, in an action for rent, that no express contract for the payment of such sum arose out of such notice, demand and occupancy.
Held, also, that, during the whole of such occupancy, the defendant was a mere trespasser, liable to be ejected as such at any time. *Gallagher v. Himmelberger*, 63
6. *Party-Wall*.—An the trial of an action by A., against B., owners of adjoining lands, to recover one-half the value of a party-wall erected by the former, on an alleged promise by the latter to pay for the same as soon as his half should be used in erecting a building, the jury found generally for the plaintiff, and specially, that the defendant had consented to allow the plaintiff to erect such wall, on condition that the half erected on the defendant's premises should be paid for by the person who should thereafter use such wall, and that such use had been made by a person to whom such premises had been conveyed by the defendant.
Held, that, on the special finding of the jury, the defendant is entitled to judgment notwithstanding the general verdict. *Eckleman v. Miller*, 88
7. *Tender*.—*Subscription*.—By an obligation payable to a certain person or bearer, the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a cer-

tain railroad company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum, which he promised to pay in instalments as the construction of the road-bed of such railroad progressed, in proportion to monthly estimates thereof, and that the whole should be paid on the completion of such road-bed.

Held, in an action on such obligation, by an assignee against the maker, that no tender of such stock need have been made to maintain an action for any single monthly instalment.

Held, also, that an action for the whole of such sum can not be maintained without such tender having first been made.

Held, also, that such obligation was not a subscription to the capital stock of such company. *Id.*

Held, also, that the one dollar, confessed in such obligation to have been received by the defendant, is too insignificant a part of the consideration to waive a tender of such stock, in an action to recover the whole principal.

Held, also, such railroad company having been made a party defendant in such action, but no judgment having been rendered against it below, that it need not be made a party to, nor served with notice of, an appeal to the Supreme Court.

Held, also, that a failure to give notice to the company of such appeal is ground for setting aside a submission of the cause on default, but not for a dismissal of the appeal.

Held, also, the company having been, by the assignment of errors, made an appellee instead of an appellant, that such assignment is informal, but a failure to object thereto is a waiver of such informality.

Clark v. Continental Improvement Co., 135

8. *Joint and Several.—Interest.*—A., B. and C. executed to D. a written contract for the sale and delivery to the latter, at a certain time and place, for an agreed price, of a specified quantity and quality of chattels, and containing the following conditions, viz.: "For all moneys advanced on said contract, I agree to pay ten per cent. interest. In case I fail to deliver said" chattels, "according to said contract, I bind myself and sureties to pay" to D. "five hundred dollars damages." D. brought suit thereon against A., B. and C., alleging their failure to comply with the contract, to recover for advances made, interest thereon and damages.

Held, that the terms of such contract are clear and definite, and that it is an obligation binding the defendants jointly and severally.

Held, also, that, where a partial payment on an obligation is made, the interest then accrued on the principal must first be discharged, and the remainder only, if any, of such payment shall be credited on the principal; but if such payment be less than the interest then accrued, the principal shall remain on interest until the aggregate payments made shall exceed the accrued interest.

Held, also, that, upon failure of the defendants to deliver the chattels contracted for, the plaintiff was entitled to recover for advances made and interest thereon, and for the whole five hundred dollars as liquidated damages. *McCormick v. Mitchell*, 248

9. *Lease of Minerals.*—A. and B., partners owning a coal-mine which they had leased to C., reserving to themselves as rent a certain royalty for each bushel of coal mined by the latter, entered into an agreement, in writing, whereby A. "turned over" to B. "his one-half of coal mined" under said lease, "for the consideration of" a certain sum per bushel, "bank measure," as "royalty," payable in instalments.

Held, in an action by A. against B., to recover an amount alleged to be due as royalty, that the terms of such contract are clear and unambiguous.

Held, also, that an answer which merely alleges that a certain amount, less than that alleged in the complaint, is due to the plaintiff, and offer-

ing to allow judgment to be taken therefor, is insufficient on demurrer, and does not amount to an argumentative denial.

Held, also, that, where the terms of a contract are plain and unambiguous, conduct of the parties in carrying out its provisions, apparently not conforming thereto, can not, in an action upon it, be so pleaded as to give to it a construction different from that warranted by its own terms.

Morris v. Thomas, 316

10. *Misjoinder.—Evidence.*—A demand for recovery for extra services ought not to be joined in the same paragraph of a complaint for particular services rendered pursuant to a contract therefor; but, if so joined, error in the admission of evidence of the former is harmless, where the court or jury trying the cause specifically refuse any allowance therefor.

Killian v. Eigenmann, 480

11. *Same.*—In an action to recover for materials furnished for a building pursuant to a contract prescribing that the amount of such materials so furnished should be ascertained by a certain rule of measurement used by builders, evidence as to the nature of that rule, as applied by the plaintiff in the measurement of buildings erected subsequent to the making of such contract, is inadmissible.

Ib.

CONVEYANCE.

See CONTRACT, 9; DECEDENTS' ESTATES, 2; FRAUD; HUSBAND AND WIFE, 2; MORTGAGE, 12; PARTNERSHIP, 5; PLEADING, 17; STATUTE OF FRAUDS; TAXES, 2, 3; VENDOR AND PURCHASER, 1, 2, 3.

1. *Acknowledgment.—Evidence.*—A conveyance of real estate, which has not been acknowledged by the grantor, is not entitled to be recorded, and, if recorded without such acknowledgment, the record is not admissible as evidence of title, in an action to recover the lands so conveyed.

Westerman v. Foster, 408

2. *Same.—Wabash and Erie Canal.*—Deeds of conveyance of real estate, purporting to be executed by the trustees of the Wabash and Erie Canal, are not admissible as evidence of title in the grantee, in an action by him to recover the possession of such real estate, upon evidence of the execution thereof by one only of such trustees; evidence of such execution by at least two of such trustees being necessary. *Ib.*

COSTS.

See REAL ESTATE, ACTION TO RECOVER, 1; STATUTE OF LIMITATIONS, 5.

COUNTY.

See PAUPER.

COUNTY AUDITOR.

See MORTGAGE, 12.

COUNTY CLERK.

Personal Liability.—Where a commissioner appointed by a court makes sale of real estate involved in a partition suit, and pays the proceeds thereof over to the clerk of such court for distribution to the parties interested, any one of the latter may maintain an action against such clerk personally, as for money had and received, for the portion due him as specified in the decree of partition, and an overpayment, out of such proceeds, to another of such parties, is no defence in such action.

Hunt v. Milligan, 141

COUNTY COMMISSIONERS.

See CRIMINAL LAW, 4; TURNPIKE, 4.

CRIMINAL LAW.

See LIQUOR LAW.

1. *Indictment.—Change of Venue.*—The fact that the record of a criminal cause, on a change of venue to another county, fails to show that the indictment therein had been endorsed "a true bill," over the signature of the foreman of the grand jury, is not ground for a motion to quash.
Beard v. The State, 8
2. *Supreme Court.*—Where, in such case, on appeal to the Supreme Court, the record shows such indictment to have been endorsed "a true bill," over the signature of the grand juror whom the record shows to have been the foreman of the grand jury which found and returned such indictment, it is sufficient.
Ib.
3. *Motion to Dismiss.*—No question in relation to the action of a court, on a motion to dismiss a criminal cause, is presented to the Supreme Court, on appeal, when neither such motion, the action of the court thereon, nor any exception to such action, is made part of the record by a proper bill of exceptions.
Ib.
4. *Perjury.*—An indictment for perjury, alleged to have been committed by a witness during the pendency of a proceeding before the "board of commissioners of said county," where the name of such county has been previously mentioned therein, sufficiently names such board.
The State v. Schultz, 19
5. *Same.*—Where, in such case, such proceeding is first alleged to have occurred at a certain time and county, a subsequent averment by the indictment, that the alleged perjury occurred "then and there," sufficiently fixes the time and lays the venue.
Ib.
6. *Same.—Highway.—Statute Construed.*—A indictment for perjury was based upon the alleged false swearing of a witness before a board of commissioners, during the hearing by them of a petition to enter of record a certain public highway, alleged to have been used as such, without having been recorded, for more than twenty years, in that the defendant had then and there falsely testified as a witness that such highway had been so used "for more than twenty years."
Held, that the charge was predicated upon a material matter.
Held, also, that section 45, 1 R. S. 1876, p. 534, of the act in relation to the location of highways, contemplates two different states of circumstances, under either of which the commissioners of a county may direct that a highway be entered of record, viz.: 1st, roads used as highways, which have been laid out, but not sufficiently described; and, 2d, highways that have been used as such for twenty years, but not recorded.
Held, that, in either of such cases, notice of a petition to have such highways described or entered of record need not be given.
Ib.
7. *New Trial.*—A new trial will not be granted on account of newly-discovered evidence which is merely cumulative. *Winsett v. The State, 26*
8. *Witness.*—It is not the duty of a prosecuting attorney, engaged in the prosecution of a person charged with a crime, to produce at the trial all the witnesses present at the commission of the crime.
Ib.
9. *Jury.*—Where, on the calling of a cause for trial, the regular jury of the term is out considering upon their verdict in another cause, which has been submitted to them, the court may, even over the objection of the defendant, empanel a special jury.
Ib.
10. *New Trial.*—An affidavit in support of a motion for a new trial, based upon the ground of alleged newly-discovered evidence, should show that due diligence had been used before the trial, to discover and produce such evidence.
O'Dea v. The State, 31

11. *Same*.—A new trial ought not to be granted on account of newly-discovered evidence which could be used only in impeaching a witness who is not a party to the action. *Ib.*
 12. *Supreme Court*.—Where the evidence given on the trial of a cause is not in the record on appeal to the Supreme Court, error assigned upon the action of the lower court in overruling a motion for a new trial, based upon the ground of alleged newly-discovered evidence, is not available. *Ib.*
 13. *Evidence*.—Declarations which form a part of the *res gestæ*, and are to be regarded as a part of the transaction in question, do not come under the head of hearsay, but are admissible as original evidence.
Binns v. The State, 46
 14. *Same*.—A declaration which is simply narrative of a past event, depending solely, for its effect, upon the credit of the person making it, and not so connected with the transaction in question as to illustrate its character, is inadmissible in evidence. *Ib.*
 15. *Same*.—*Murder*.—On the trial of a defendant indicted for murder, declarations of the deceased, made in the absence of the defendant and after the infliction of the injury, subsequently resulting in death, as to the manner in which, and the means by which, such injury was inflicted, are not admissible as evidence against the defendant. *Ib.*
 16. *Same*.—*Motive*.—Where, in such case, the defendant was on trial for the alleged murder of his wife, it is not competent, as tending to establish a motive for the commission of the murder, to introduce in evidence the record of a decree of a court, in an action by the deceased, against the defendant, for a divorce, ordering the latter to pay money into court, restraining him from selling his property, appointing a receiver, etc. *Ib.*
 17. *Same*.—In such case, as tending to show the state of feeling between the defendant and the deceased, parol evidence of the pendency of such suit may be given. *Ib.*
 18. *Same*.—*Self-Defence*.—On the trial of a defendant indicted for murder, where the evidence showed that he, being disabled in one arm, had procured a pistol to defend himself against a threatened assault by an able-bodied man, and that, while standing on a public street, leaning against a building, surrounded by an excited crowd, he had been threatened by another person, and then struck by a third, the deceased, whom he at once had shot and killed, the court instructed the jury, that, "before a man can take life in self-defence, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault."
- Held*, that such instruction is erroneous.
- Held*, also, that where a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, he kills his assailant, he is justifiable.
- Held*, also, in such case, that, from the evidence, the real question presented for the determination of the jury was, did the defendant, when assaulted, believe, and have reason to believe, that the use of a deadly weapon was necessary to his own safety?
- Held*, also, that no question as to the duty of the defendant to retreat was presented to the jury by the evidence. *Rumyan v. The State, 80*
19. *Juror*.—In criminal causes in this State, it is the general rule, in relation to a challenge of a juror by the defendant for cause, that an opinion formed by the juror as to the guilt or innocence of the accused, based solely upon a newspaper account of the alleged crime, and

which, in the belief of the juror, will not have any influence upon him in the trial of the cause, is not sufficient ground for challenge.

Hart v. The State, 102

20. *Larceny*.—On the trial of a defendant charged with larceny, the court instructed the jury, that, if the defendant snatched the property, alleged to have been stolen, from the hand of the owner, and retained it without the consent of the latter, this constituted larceny.

Held, that the instruction is erroneous.

Held, also, that, to constitute larceny, the taking must be with a felonious intent, existing at the time. *Ib.*

21. *Supreme Court*.—Unless a brief be filed by the appellant, on the appeal of a cause to the Supreme Court, it will be dismissed.

The State v. Lieben, 106

22. *Assault with Intent*.—An indictment charged the defendant with having committed an assault and battery, with intent to commit a rape, upon a certain woman, alleging her surname in one place to be McKaskey, in another as McKlaskey, and finally as McKloskey.

Held, that the indictment is insufficient.

Black v. The State, 109

23. *Same—Evidence*.—On the trial of the defendant on such indictment, the name of the person assaulted was shown by the evidence to be McCoskey.

Held, that a conviction of the defendant was erroneous. *Ib.*

24. *Fornication—Statute of Limitations*.—An indictment for open and notorious fornication alleged that the defendant, during a time specified, more than two years prior to the finding of the indictment, had openly lived and cohabited with a certain unmarried woman, and had "concealed the fact of said crime until," etc., "by publicly acknowledging and claiming the said" woman "to be his wife."

Held, that the indictment is insufficient, the alleged concealment not being of the fact of the crime charged.

Held, also, that the mere denial, by the defendant, of having committed a crime charged, is not such a "concealment" as is contemplated by section 13 (2 R. S. 1876, p. 374,) of the act in relation to criminal pleading and practice.

Robinson v. The State, 113

25. *Fish Law*.—An affidavit filed before a justice of the peace charged, that, "on or about" a certain day in April, in a certain year, at a certain county in this State, the defendant "did then and there unlawfully take one fish, with a spear, in and from" a certain river.

Held, that the affidavit is sufficient.

Stuttsman v. The State, 119

26. *Same—Constitutional Law*.—The act of February 22d, 1871, (2 R. S. 1876, p. 481,) "for the protection of fish," etc., is constitutional. *Ib.*

27. *Keeping Gaming Apparatus*.—Upon the trial of a defendant indicted for being "unlawfully the keeper of a certain faro-bank, for the purpose of wagering thereon articles of value," the court, over the objection of the defendant, permitted a witness on behalf of the State to testify that he had understood "from others, that the defendant" and another "were the owners of the faro-bank," and that he knew its ownership only "by hearsay."

Held, that the evidence was merely hearsay, and incompetent, and its admission erroneous.

Schooler v. The State, 127

28. *Forgery*.—An indictment for forgery charged the defendant with having uttered and published "as true, to one" A. B., "a certain false, forged and counterfeit promissory note for the payment of money," setting out a copy of a promissory note, payable to the defendant and purporting to be executed by one "S. B. Skinner," with intent to defraud one Solomon B. Skinner, etc.

Held, that it should have been alleged, and can not be inferred, that the person by whom such instrument purports to have been executed is the

same person as the one whom it is alleged it was intended to defraud, and that the indictment is therefore insufficient on motion in arrest.

Shinn v. The State, 144

29. *Same.—Intent.*—Whether an indictment for forgery is for committing the original forgery, or for uttering the forged paper as true, the intent may be laid to be to defraud the person whose name has been forged.
Ib.
30. *Witness.—Defendant.*—Where two or more defendants are jointly indicted for the same offence, the prosecuting attorney may, by leave of court, dismiss the prosecution as to any one of them, and compel him to testify as a witness against the others. *Baker v. The State*, 255
31. *Directors of Turnpike Company.*—Where the directors of a turnpike company fail or refuse to cause to be made out and published a full and complete statement under oath of the financial condition of their company, as required by the act of March 9th, 1875, (1 R. S. 1876, p. 673,) they may be indicted and prosecuted under the second section of such act
Ib.
32. *Law.—Impeaching Witness.*—Where no evidence has been introduced in support of the general moral character of the defendant in a criminal cause, it is error to allow counsel for the State, in cross-examining the defendant while testifying as a witness, to ask him whether he had ever been convicted of a crime. *Farley v. The State*, 331
33. *Same.*—A witness in a criminal prosecution can not be impeached by evidence as to his general moral character.
Ib.
34. *Evidence.*—A judgment of conviction of a crime can not be established by parol evidence.
Ib.
35. *Larceny.*—On the trial of a defendant indicted for the larceny of a chattel, and for receiving such chattel feloniously, it is error to exclude a bill of sale of the chattel, executed to the defendant by another, offered in evidence by the defendant.
Ib.
36. *Recalling Jury.*—At the request of the jury trying a criminal cause, the court may recall and give them additional instructions, after they have retired to agree upon a verdict.
Ib.
37. *Larceny.—Fraud.*—Where a person obtains possession of a chattel from the owner by a fraudulent trick or contrivance, with intent to steal, though with the consent of the latter, he is guilty of larceny.
Huber v. The State, 341
38. *Same.—Instruction to Jury.*—On the trial of a defendant indicted for larceny, the court instructed the jury, that they should not convict the defendant, unless the State had proved that the defendant had stolen some part of the property described in the indictment, "that the property stolen was of some value," and, "if stolen, was the property of" the prosecuting witness, and that "the act of stealing" had been "committed in this county within two years prior to the finding of the indictment."
Held, that the instruction is not erroneous. *Ib.*
39. *Comments of Counsel.—Appearance of Defendant.*—It is not error, that the prosecuting attorney, on the trial of a criminal prosecution wherein the defendant has testified as a witness in his own behalf, in commenting on the credibility of the defendant, was allowed to refer to the appearance of the countenance of the latter while testifying, though abstractly such comments would be improper.
Ib.
40. *Judgment.—Form of.*—A judgment against the defendant in a criminal prosecution, that "It is considered by the court that the defendant do make his fine to the State of Indiana in the sum of," etc., pay costs, and stand committed, etc., is sufficient.

Strong v. The State, ex rel., etc., 423

41. *Billiard Table.—Minors.*—An indictment under the act of March 8th, 1873, (2 R. S. 1876, p. 484,) in relation to the keepers of billiard tables, charged, that the defendant, "having the control and management of" a saloon in which billiard tables were kept, suffered and permitted certain minors to congregate in such saloon.

Held, on motion in arrest, that the indictment is insufficient.

Hanrahan v. The State, 527

42. *Same.*—An indictment charged the defendant with having allowed a certain minor, with other minors not named, "to play at a certain game, on a billiard table, called billiards," in his saloon, "of which he was then and there the owner."

Held, on motion to quash, that it is not necessary to aver that such game was played for a wager.

Held, also, that the averment as to the ownership of the billiard table is too vague, and, therefore, that the indictment is bad.

The State v. Ward, 537

CURATIVE ACT.

See CITIES AND TOWNS, 8.

DAMAGES.

See ARBITRATION, 10; CONTRACT, 8; EVIDENCE, 8; MALICIOUS PROSECUTION, 1; MARRIAGE, 2; SPECIFIC PERFORMANCE, 2; SUPREME COURT, 9.

DEATH.

See BASTARDY; SUPREME COURT, 18.

DECEDENTS' ESTATES.

See PLEADING, 1, 11; PROMISSORY NOTE, 9 to 12; SUPREME COURT, 26.

1. *Real Estate.*—As a general rule, real estate on the death of the owner passes to the heir or devisee, and the administrator or executor has no power over it, except that given by the statute or the will.

Hankins v. Kimball, 42

2. *Same.—Conveyance by Executor.—Release.*—An executor has no power, as such, to execute to a railroad company a release to a right of way over lands belonging to his testator's estate, and can not be held liable, as such, for money received by him for such release, in an action against him by the devisee.

Ib.

3. *Same.—Assets.*—Money so received by an executor is no part of the assets of such estate.

Ib.

4. *Executor and Administrator.—Personal Property.*—At common law, an executor or administrator had the same property in, and power over, the personal property of a decedent, as did the latter himself in his lifetime, but that power has been limited in this State by legislation.

Weyer v. The Second National Bank, etc., 198

5. *Same.*—The common law, except where it is inconsistent with the constitutions of the United States and of this State, and with the statutes of Congress and of this State, has always been, and is, the law of this State.

Ib.

6. *Public Sale.—Fraud.*—Where personal property belonging to a decedent's estate is sold at public sale by the executor or administrator, the purchaser thereby acquires the same title thereto as was had by the decedent in his lifetime, though the sale may be wholly unnecessary; and such sale can only be avoided for fraud or collusion practised by the executor or administrator and the purchaser.

Ib.

7. *Private Sale.*—An executor or administrator must sell the personal property of his decedent's estate at public auction only, unless, upon application to the proper court, he obtains an order authorizing a private sale.

Ib.

8. *National Bank Stock.—How Transferable.*—An executor, who was also one of the directors of a certain national bank, without being authorized so to do by either the terms of his testator's will or the order of any court, and without its being necessary for the payment of debts, sold to a purchaser at private sale, without notice, certain shares of stock in such bank belonging to his testator, and assigned and transferred the certificate of stock to the purchaser, taking therefor the promissory note of the latter, which was subsequently paid to the executor, who converted the same to his own use. Such sale was never reported to, nor confirmed by, any court, and the executor sat with the board of directors of such bank, and voted with them, in making a transfer of such stock upon the books of the bank to the purchaser, though no new certificate of stock was issued to him. Such executor, and his sureties, becoming insolvent, he was removed and his successor appointed, who brought an action against such bank and purchaser to have such sale and transfer set aside, and to compel the issuance to him, as executor, of a certificate of such stock, or to recover the value of the same, alleging in his complaint the foregoing facts, and that he had made demand of the defendants.
Held, on demurrer to the complaint, that such stock was personal property belonging to such estate.
Held, also, that the section of the statute making promissory notes negotiable by endorsement (1 R. S. 1876, p. 635, sec. 1,) is not applicable to the sale and transfer of a certificate of bank-stock.
Held, also, that by the 12th section of the act of Congress, approved June 3d, 1864, (R. S. U. S., p. 999, sec. 5139,) in relation to the incorporation of national banks, shares of stock in any such bank are transferable only on the books of the bank.
Held, also, that the endorsement of such certificate, and the transfer of such stock, by the executor passed no title to the purchaser.
Held, also, that the purchaser at such sale was bound to know whether or not such executor had power to make the sale.
Held, also, that where one person assumes to have the right to dispose of the property of another, the purchaser buys at his peril.
Held, also, that the complaint is sufficient. Ib.
9. *Set-off.—Partnership.*—Where a surviving partner purchases from the administrator of his deceased partner the interest of the latter in the partnership property, as assets of the estate, he can not, in a suit to collect the purchase-money, set off a debt due him from such decedent in his lifetime, even if such set-off grew out of a settlement of partnership matters. Welborn v. Coon, 270
10. *Adultery.—Widow.*—Where a wife has abandoned her husband, and, at the time of his death, is living in adultery, the 32d section of the statute of descents prevents her from taking the personal property otherwise allowed by statute to the widow. Owen v. Owen, 291
11. *Claim.*—A plain and succinct statement, duly verified, without the formality usual in a complaint, is all that is required in a claim filed on account against the estate of a decedent. Dodds v. Dodds, 293
12. *Payment of Debts.—Duty of Administrator.—Real Estate.—Widow.—Mortgage.*—An insolvent debtor, the owner of certain real estate encumbered by a mortgage for purchase-money in which his wife had not joined, died intestate, leaving her surviving him, and leaving personal property in excess of the amount allowed by law to his widow, and of the amount necessary to discharge the expenses of administration, his last sickness and his funeral. The administrator, having in his hands such excess, suffered such real estate to be sold on foreclosure of such mortgage, whereupon the widow brought suit against him to require him to pay to her the one-third value of such real estate.

Held, that she is entitled to a judgment for one-third of such excess, not exceeding however the one-third value of such real estate.

Held, also, that the fact that she did not join in such mortgage, and had not relinquished her interest in such realty, is no defence to such action.

Held, also, that the fact that such mortgage was given for purchase-money was no excuse for the failure of the administrator to protect her interest therein. *Morgan v. Sackett*, 580

DECLARATIONS.

See CRIMINAL LAW, 13, 14, 15; EVIDENCE, 11.

DELIVERY BOND.

See PRINCIPAL AND SURETY, 1.

DEMAND.

See PLEADING, 19; PROMISSORY NOTE, 6, 8.

DEMURRER.

See JUDGMENT, 5; PARTIES, 2; PLEADING, 7, 8; PRACTICE, 2, 5, 11, 12; TURNPIKE, 1; USURY, 1.

DESCENTS.

See ADEMPMENT; DECEDENTS' ESTATES, 1, 10.

1. *Statute of.*—Section 7.—Under the provisions of section 7 (1 R. S. 1876, p. 409,) of the act of May 14th, 1852, "regulating descents," etc., the widow of a husband who dies intestate and without children or their descendants alive is entitled to one-third, and the donor to two-thirds, in fee, of any real estate of which the husband dies seized, and which came to him by gift or conveyance in consideration of love and affection. *Myers v. Myers*, 307
2. *Same.—Proviso.*—By the proviso of such section, it is intended that the widow of an intestate husband who has died seized of real estate so acquired shall hold a lien, not on a part, but on the whole, of such realty for the value of all improvements by her made, and for all money belonging to her separate estate by her expended in making improvements, thereon, prior to her husband's death. *Id.*

DILIGENCE.

See PROMISSORY NOTE, 6.

DISCLAIMER.

See REAL ESTATE, ACTION TO RECOVER, 1, 2.

DISMISSAL.

See PLEADING, 6; USURY, 3.

DIVORCE.

1. *Custody of Child.*—It is not imperative upon the court, in an action for divorce, where the custody of a minor child of the parties is granted to the wife, to decree an allowance to the wife, from the husband, for its support. *Conn v. Conn*, 323
2. *Same.—Liability of Father.*—The rendition of a decree of divorce in favor of the wife, and the granting to her of the custody of minor children of the parties, do not relieve the husband of his obligation to provide means for their support and education. *Id.*
3. *Same.*—The father has the legal right to the custody of his children, unless it be clearly shown that he is unfit for its exercise. *Id.*
4. *Alimony.*—The discretion of the circuit court as to the amount of alimony to be allowed to the wife, on granting her a decree of divorce,

will not be revised by the Supreme Court on appeal, unless exercised indiscreetly. *Ib.*

5. *Jurisdiction*.—A decree of divorce rendered by a court having no jurisdiction of the subject-matter, or of the parties, may be annulled and set aside, in a proper proceeding therefor. *Willman v. Willman*, 500
6. *Review of Judgment*.—An action to annul and set aside a judgment is not a proceeding to review the same. *Ib.*
7. *Same*.—*Jurisdiction*.—Jurisdiction of a party to a civil action can only be acquired, either by the due service upon him of a summons, or by his voluntary appearance. *Ib.*
8. *Same*.—*Pleading*.—The defendant, in an action wherein a divorce was granted to the plaintiff, after the death of the latter, testate, filed a complaint against his heirs and devisees, alleging that she had had no notice of such action, that no summons had been issued for or served upon her, that she had not appeared to the action, and that the only appearance by her, pretended by the plaintiff, was the filing by him, with his complaint, of a paper purporting to be signed by her, waiving the issue and service of summons; and she asked that such judgment be annulled and set aside, that she be permitted to contest the validity of the testator's will, and that she be recognized as his widow. *Held*, on demurrer, that, by the averments of the complaint, such court had no jurisdiction of the defendant in such action, that the proceedings subsequent to the filing of the complaint therein were void, and that the complaint in this action is sufficient. *Ib.*
9. *Cruel Treatment*.—A groundless prosecution of the husband, by the wife, for an alleged crime, resulting in his trial and acquittal, is not "cruel and inhuman treatment." *Small v. Small*, 568

DOG TAX.

See TAXES, 4, 5, 6.

DONATION.

See CITIES AND TOWNS, 4 to 10.

DOWER.

See SPECIFIC PERFORMANCE, 3.

DUPLICITY.

See LIQUOR LAW, 14.

EJECTMENT.

See CONTRACT, 5; REAL ESTATE, ACTION TO RECOVER, 3.

ENTRY.

See PLEADING, 18.

ESTOPPEL.

See CITIES AND TOWNS, 6; MORTGAGE, 11; PARTNERSHIP, 2, 7; PROMISSORY NOTE, 1, 2.

EVIDENCE.

See CONTEMPT, 2; CONTRACT, 10, 11; CONVEYANCE, 1, 2; CRIMINAL LAW, 7, 10 to 17, 18, 23, 27, 30, 32; JUDGMENT, 8; LIQUOR LAW, 5, 6; MALICIOUS PROSECUTION, 2; NEW TRIAL, 1, 4, 7, 8; PLEADING, 4, 5; PRACTICE, 1, 4, 6, 8, 12, 14, 16, 17; RAILROAD, 9; REAL ESTATE, ACTION TO RECOVER, 3, 4; SPECIFIC PERFORMANCE, 3; SUPREME COURT, 1, 3, 8, 11, 13, 20; TAXES, 2; TELEGRAPH COMPANY; VENDOR AND PURCHASER, 1; WILL, 3, 4, 5; WITNESS.

1. *Cross-Examination*.—*Testimony of Deceased Witness*.—On the trial of

an action which had been tried once before, a person, testifying for the defendant as to the testimony, on the former trial, of a witness since deceased, stated that said deceased witness had testified to certain facts, and had not been cross-examined. The plaintiff, in rebuttal, introduced a witness, who testified that he had heard the testimony, on the former trial, of said deceased witness, related some of his testimony, and stated that he had testified to other matters, and was cross-examined. On cross-examination by the defendant of this rebutting witness, he was asked to state all that said deceased witness had testified to on said former trial.

Held, that it was error to sustain an objection to this question.

Harness v. The State, ex rel. Platt, 1

2. *Same*.—It is error to deny to a party the right, in cross-examining his adversary's witness, to propound a question within the limits of proper cross-examination, though the party asking the question does not state what he expects to prove by the answer. *Ib.*
3. *Weight of*.—Courts ought not, as a rule, to weigh the evidence produced by the respective parties to a cause merely by the number of witnesses who may testify for each, but must determine which are the more worthy of belief; and, where the evidence is conflicting, such decision will not be disturbed by the Supreme Court. *Rudolph v. Lane, 115*
4. *Parol Evidence of Writing Destroyed*.—Parol evidence may be given of the contents of an instrument which has been destroyed, whether such destruction was done purposely, by accident, or by mistake. *Ib.*
5. *Same*.—*Fraud*.—Where such destruction was done purposely, and apparently with a fraudulent design, parol evidence of its contents will not be permitted, without first rebutting the presumption of fraud. *Ib.*
6. *Character of Defendant*.—*Trespass*.—In an action to recover damages resulting from the commission of an unlawful act, evidence of the general good character of the defendant is not admissible, whether such act is or is not indictable, except where his character is directly in issue, and, from the nature of the act charged, is of special importance. *Gebhart v. Burkett, 378*
7. *Same*.—*Arson*.—Such evidence is not admissible under the general denial, in an action to recover damages for the alleged unlawful and malicious burning of a building. *Ib.*
8. *Same*.—*Damages*.—The damages recoverable in such action are compensatory merely, and not punitive. *Ib.*
9. *New Trial*.—Error in the exclusion of evidence offered on the trial of a cause is not available, where, during such trial and before the close of the evidence, the court reverses its former ruling and notifies the party offering it that it will be admitted. *Ib.*
10. *Same*.—Error in the admission of evidence which is harmless to the party complaining thereof is not available as ground for a new trial, or on appeal to the Supreme Court. *Ib.*
11. *Declarations of Wife*.—The declarations of a wife concerning a material matter, made to her husband in the presence of a third person, in which he either directly or indirectly acquiesces, is not a confidential communication, but may be given in evidence against him. *Ib.*
12. *Instruction to Jury*.—Error in the admission of evidence is not available as ground for a new trial, where, by the instructions of the court to the jury, they are directed to disregard it in the absence of other evidence rendering it material. *Ib.*
13. *Judgment*.—*Indiana Reports*.—The printed report of a decision of the Supreme Court, issued by authority of law, is not competent original evidence of a judgment rendered by such court in any cause. *Donellan v. Hardy, 393*

14. *Same*.—The judgment rendered by the Supreme Court in the decision of a cause may be proved by a transcript thereof properly attested by the clerk of such court, under the seal thereof, or by the record of such transcript in the order book of the court from which such cause was appealed, certified down according to law. *Ib.*
15. *Same*.—*Secondary Evidence*.—Secondary evidence of a judgment rendered by the Supreme Court can not be admitted without evidence of the destruction of the record of such judgment. *Ib.*
16. *Petition for Rehearing*.—The fact that a petition for a rehearing of a cause decided by the Supreme Court has been overruled can not be proved by the notice of that fact, given by the clerk of such court to the clerk of the court below. *Ib.*
17. *Hearsay*.—Hearsay evidence as to a material matter in controversy is inadmissible. *Killian v. Egenmann*, 480

EXECUTION.

See FRAUD; HUSBAND AND WIFE, 3; PARTNERSHIP, 2, 3, 6.

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES.

EXPERT.

See WILL, 3, 4, 5.

FALSE RETURN.

See PLEADING, 11.

FISH.

See CRIMINAL LAW, 25, 26.

FORECLOSURE.

See MORTGAGE; REDEMPTION; VENDOR AND PURCHASER, 3.

FOREIGN STATE.

See PRACTICE, 1.

FORGERY.

See CRIMINAL LAW, 28, 29.

FORMER ACQUITTAL OR CONVICTION.

See LIQUOR LAW, 5, 6.

FORMER ADJUDICATION.

See JUSTICE OF THE PEACE, 2, 3; MORTGAGE, 4, 11; PLEADING, 6;
PRINCIPAL AND SURETY, 2.

1. *Judgment without Jurisdiction*.—Where, to the complaint in an action upon a promissory note, the defendant answers former adjudication, setting out a transcript thereof, which shows a judgment against him, by default, upon insufficient notice, a reply that such judgment defendant had no notice of such suit, and that the court had no jurisdiction over him therein, is sufficient. *Davis v. Green*, 493
2. *Same*.—*Verbal Agreement Contradicting Writing*.—An answer in such action, alleging a contemporaneous verbal agreement, varying the terms of the note, is insufficient. *Ib.*

FORNICATION.

See CRIMINAL LAW, 24.

FRAUD.

See CITIES AND TOWNS, 10; CRIMINAL LAW, 37; DECEDENTS' ESTATES, 6; EVIDENCE, 5; MORTGAGE, 7 to 11; TURNPIKE, 3; VENDOR AND PURCHASER, 2.

1. *Fraudulent Conveyance.—Instruction to Jury.*—A judgment debtor, who held a title bond for the conveyance of certain real estate, being unable to pay the purchase-money, sold and assigned the same to another, who paid the purchase-money and received a conveyance of such realty. The judgment creditor having instituted an action to subject such realty to the payment of his judgment, the court trying the cause instructed the jury, that, if the defendant had received such conveyance with knowledge of such judgment, thus placing property of the judgment debtor beyond the reach of execution, that fact was a sufficient badge of fraud to infer that such sale had been fraudulent.

Held, that the question of fraud was one for the jury alone, and that the instruction was erroneous. *Leasure v. Coburn*, 274

2. *Same.—Husband and Wife.*—In an action against a judgment debtor and his wife, by the judgment creditor, to subject to execution certain real estate conveyed to her, the complaint alleged that such judgment had been rendered for the value of certain personal property furnished to the defendants for their use in a certain business carried on by them jointly, that such realty had been paid for chiefly out of the means of the husband, and the joint earnings of himself and wife, that they had conspired together to cheat, hinder and delay the plaintiff in the collection of his judgment, and that the husband had no property subject to execution.

Held, that the complaint is insufficient for want of an allegation, that such indebtedness existed at the time such payment on the realty was made by the husband.

Held, also, that it is insufficient for the want of the further allegation, that such payment had been made by the husband with intent to defraud.

Held, also, that it is insufficient for want of the further allegation, that, at the time such payment was made, the husband had not sufficient property remaining to pay all his debts. *Bentley v. Dunkle*, 374

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GAMING.

See CRIMINAL LAW, 27, 41, 42.

HEARSAY.

See CRIMINAL LAW, 13, 27; EVIDENCE, 17.

HIGHWAY.

See CRIMINAL LAW, 6; TURNPIKE, 4.

HUSBAND AND WIFE.

See DESCENTS; DIVORCE; EVIDENCE, 11; FRAUD, 2; LIQUOR LAW, 7, 9; NEGLIGENCE, 1, 2; SPECIFIC PERFORMANCE, 2, 3.

1. *Married Woman.—Promissory Note and Mortgage.*—A married woman, with the consent of her husband, may make an equitable assignment of a note and mortgage executed to her, by the sale and mere delivery of the same to another. *Baker v. Armstrong*, 189

2. *Conveyance to.—Tenants by Entireties.*—The portion conveyed to a husband and wife by a conveyance of real estate to them and a third person is held by them as tenants by entireties, though they be not described therein as husband and wife, and is not subject to execution for the debts of the husband. *Hullett v. Inlow*, 412

3. *Same.—Injunction.*—An execution creditor of the husband, and the sheriff holding the execution, may be enjoined by the husband and wife from levying upon and selling real estate held by them as tenants by entireties. *Ib.*

IMPEACHMENT.

See EVIDENCE, 6; CRIMINAL LAW, 11, 32, 33, 34; WITNESS.

INDEMNITY.

See MORTGAGE, 6; PLEADING, 15.

INDIANA REPORTS.

See EVIDENCE, 13.

INDICTMENT.

See CRIMINAL LAW, 1, 2, 4, 5, 6, 22, 24, 28, 31, 41, 42; LIQUOR LAW, 4, 10, 14.

INJUNCTION.

See HUSBAND AND WIFE, 3; PARTNERSHIP, 2, 5, 6, 7.

1. *Enjoining Lawsuit.*—Legal proceedings will not, as a general rule, be enjoined on grounds of which the defendant therein may avail himself in defence of such action. *Hartman v. Heady*, 545
2. *Same.—Threats.*—Threats made by the plaintiff in an action, that he will bring other actions against the defendant, afford no ground to the latter to enjoin the further prosecution of such action. *Ib.*

INSANITY.

See MALICIOUS PROSECUTION, 1; WILL, 1 to 5.

INSTRUCTION TO JURY.

- See BANKRUPTCY, 2; CRIMINAL LAW, 18, 20, 36, 38; EVIDENCE, 12; FRAUD, 1; LIQUOR LAW, 12; MARRIAGE; MORTGAGE, 11; NEW TRIAL, 2, 4, 5, 10, 12; PARTNERSHIP, 4; PRACTICE, 3, 13; PRINCIPAL AND AGENT; WILL, 2.
1. *New Trial.*—Error in giving or refusing instructions to the jury is ground for a new trial, but can not be independently assigned, as such, on appeal to the Supreme Court. *Eckleman v. Miller*, 88
 2. *Assumption of Fact.*—An instruction to the jury, informing them what witnesses have testified to, is erroneous. *Killian v. Eigenmann*, 480

INTEREST.

See CITIES AND TOWNS, 4; CONTRACT, 8.

Allowed without Contract.—Interest may be allowed in an action for money due, where payment has been unreasonably delayed, even where it has not been stipulated for. *Killian v. Eigenmann*, 480

INTERLOCUTORY ORDER.

See SUPREME COURT, 25, 26.

INTERROGATORY TO JURY.

See CONTRACT, 6; REPLEVIN.

1. *Answers.—Verdict.*—Unless the answers of a jury trying a cause, to interrogatories, are inconsistent with their general verdict, the latter must stand. *Alexander v. The North-Western, etc., University*, 466
2. *When Refused.—Practice.*—The court may refuse to submit interrogatories to a jury, which they are asked to answer, not in the event that they return a general verdict, but absolutely. *Killian v. Eigenmann*, 480

3. *By Court.—Discretion.*—The court may, of its own motion, put proper interrogatories to a jury; but an abuse of this power will be error. *Ib.*

INTOXICATION.

See RAILROAD, 11, 12.

JOINDER.

See NEGLIGENCE.

JUDGMENT.

See CRIMINAL LAW, 40; DIVORCE, 4, 5, 6; EVIDENCE, 13 to 16; FORMER ADJUDICATION, 1; JUSTICE OF THE PEACE, 2; PARTIES; PARTNERSHIP, 2; PLEADING, 9, 16; PRACTICE, 1; PRINCIPAL AND SURETY, 2; REAL ESTATE, ACTION TO RECOVER, 1; SPECIFIC PERFORMANCE, 2, 3; STATUTE OF LIMITATIONS, 3 to 7; SUPREME COURT, 18, 24, 25; TAXES, 3; TURNPIKE, 10; USURY, 4; VENDOR AND PURCHASER, 3.

1. *Set-Off.*—A judgment rendered against a defendant who has pleaded a set-off is one, in effect, for the amount of both judgment and set-off.

Shriver v. Bowen, 266

2. *Amendment.—Nunc Pro Tunc.*—Where, by mistake, the name of a party, against whom, with others, a judgment has been rendered, is omitted from the entry of such judgment, such mistake may, on proper notice to all concerned, be corrected at any time by a *nunc pro tunc* entry, if there be some preceding entry in the original cause, by which the correction may be made.

Bales v. Brown, 282

3. *Presumption.—Settlement.*—Matters of account existing between parties prior to the rendition of a money judgment in favor of one, against the other, are presumed to have been settled before its rendition.

Dodds v. Dodds, 293

4. *Same.—Payment.—Lapse of Time.*—The mere lapse of almost three years' time from the rendition of a judgment is not ground for presuming that it has been paid.

Ib.

5. *Amendment.—Motion not Demurrable.*—A complaint to correct the amount of a judgment should be regarded as a mere motion for that purpose, and is not subject to be tested by demurrer, nor, on appeal to the Supreme Court, by an assignment of error that it is insufficient.

Latta v. Griffith, 329

6. *Same.—Jurisdiction.*—Where, in such case, a complaint in the ordinary form has been filed in the court in which the judgment was rendered, alleging the nature and amount of the mistake, such court has jurisdiction of the subject-matter, and power to make the proper correction.

Ib.

7. *Same.—Notice.*—Where notice of such proceeding is given to the defendant, by service of summons in a county adjoining that wherein such action is pending, four days prior to the term at which it is to be heard, such notice is reasonable, and gives to the court jurisdiction of his person, and if he fail to appear he may be defaulted.

Ib.

8. *Attacking Collaterally.—Process.—Evidence.*—Though the record of a judgment offered as evidence in a cause fails to show that the judgment defendant had been served with summons, yet it can not be attacked collaterally.

Goar v. Maranda, 339

9. *Review of.*—A complaint to review a judgment for alleged error of law, apparent on the face of the record, must contain a complete transcript of all the pleadings and proceedings of the cause wherein such judgment was rendered.

Goar v. Cravens, 365

10. *Same.*—Where such complaint to review does not show that exceptions were duly taken to the errors alleged, it is insufficient on demurrer. *Ib.*

JURISDICTION.

See DIVORCE, 5, 7; FORMER ADJUDICATION, 1; JUDGMENT, 6, 7; JUSTICE OF THE PEACE, 5; PRACTICE, 15; SUPREME COURT, 15.

JUDICIAL NOTICE.

See MORTGAGE, 13; SUPREME COURT, 12; TURNPIKE, 7.

JURY.

See ARBITRATION, 7; CRIMINAL LAW, 9, 19, 36; LIQUOR LAW, 11; NEW TRIAL, 12.

1. *Trial by.*—The provision of section 20, article 1, of the constitution of this State, that the "right of trial by jury shall remain inviolate," was adopted in reference to the common-law right of trial by jury.
Allen v. Anderson, 388
2. *Same.—Partition.*—Neither party, in an action to review the report of commissioners partitioning real estate, can demand a trial by jury as of right. *Ib.*

JUSTICE OF THE PEACE.

See PARTIES, 1; PLEADING, 1, 2; RAILROAD, 1, 9; REPLEVIN; SUPREME COURT, 15.

1. *Court of Record.*—The court of a justice of the peace in this State is a court of record. *Pressler v. Turner*, 56
2. *Judgment.—Former Adjudication.*—A judgment, unappealed from, rendered, in an action on a promissory note, by a justice of the peace having jurisdiction of the subject-matter and parties, where the constable's return on the summons issued to the defendant shows, that, more than three days prior to the rendition of judgment, it had been "served by reading," is binding on the parties thereto, is conclusive evidence of the facts therein set forth, can not be impeached or contradicted in a collateral proceeding, and will support an answer of former adjudication, pleaded to a subsequent complaint on the same cause of action, by and against the same parties. *Ib.*
3. *Same.*—Where a judgment has been so rendered, the plaintiff, alleging such process to have been insufficient, can not treat such judgment as void, and maintain another action against the same parties, on such note. *Ib.*
4. *Same.—Principal and Surety.*—Where such cause of action has been once so recovered upon, against two or more makers, the latter, in a subsequent action thereon against them, by the same plaintiff, can not plead or try the question of suretyship. *Ib.*
5. *Relationship to Parties.*—The fact, that a deceased former wife of a party to an action pending before a justice of the peace was the aunt of the wife of such justice, does not deprive the latter of jurisdiction of the cause, whether there be issue of such marriage alive or not.
Trout v. Drawhorn, 570
6. *Same.—Affinity.*—Relationship by affinity ceases with the dissolution of the marriage creating it, except so far as the children of such marriage are concerned. *Ib.*

KOKOMO, CITY OF.

See CITIES AND TOWNS, 8.

LANDLORD AND TENANT.

See CONTRACT, 5; MECHANIC'S LIEN, 1.

LARCENY.

See CRIMINAL LAW, 20, 35, 37.

INDEX.

LEASE.

See CONTRACT, 9.

LEVY.

See PARTNERSHIP, 2, 3, 6.

LICENSE.

See LIQUOR LAW, 8, 10 to 12.

LIEN.

See DESCENTS, 2; PARTNERSHIP, 3.

LIQUOR LAW.

1. *Constitutional Law*.—Section 12 of the act of March 17th, 1875, (1 R. S. 1876, p. 869,) "to regulate and license the sale of" intoxicating liquors, is not unconstitutional. *O'Dea v. The State*, 31
2. *Sale*.—A person having no license, who sells intoxicating liquor in quantities of a quart or more at a time, separating that sold from the bulk out of which it is drawn, is not liable to a prosecution therefor, though the same be not then paid for by the purchaser, but charged as a sale on account, and though the purchaser take away less than a quart, leaving the remainder so separated, subject to his order. *Dobson v. The State*, 69
3. *Same*.—*Motive*.—The vendor, in such case, is not punishable, whatever may have been his motive or purpose in making the sale. *Ib.*
4. *Sale to Minor*.—*Indictment*.—An indictment for selling intoxicating liquor to a minor, alleging him to have been, at the time and place of such sale, "then and there a person under the age of twenty-one years," is sufficient. *Brinkman v. The State*, 76
5. *Evidence*.—*Former Conviction*.—Evidence of a former conviction is admissible under the general issue. *Ib.*
6. *Same*.—*Once in Jeopardy*.—Two indictments having been returned against a defendant, each charging an unlawful sale of intoxicating liquor, on the same day, to the same person, the State, on the trial of the first, on which the defendant was convicted, introduced evidence of two unlawful sales to such person, made by the defendant on the same day, without any election having been made by the prosecuting attorney as to which of such sales he would insist upon for a conviction. On the trial of the second indictment, evidence was introduced by the defendant of such former conviction, and that the evidence in each prosecution related to the same sales.
Held, that the defendant had once been put in jeopardy, and that a conviction on the second indictment, on the same evidence, was erroneous. *Ib.*
7. *Act of 1873*.—*Section 12*.—*Constitutional Law*.—Section 12 of the act of February 27th, 1873, (Acts 1873, p. 151,) regulating the sale of intoxicating liquors, etc., in so far as it gave a right of action to any one injured in person or property by an intoxicated person, against the person causing the intoxication, was constitutional. *Horning v. Wendell*, 171
8. *Same*.—*License*.—A person licensed under the provisions of such act took his license subject to all the restrictions and burdens imposed by such section. *Ib.*
9. *Act of 1875*.—*Section 20*.—*Action by Wife*.—In an action by a wife, against a person licensed under the provisions of the act of March 17th, 1875, (1 R. S. 1876, p. 869,) regulating the sale of intoxicating liquors, etc., the complaint alleged that the defendant had sold intoxicating liquor to the plaintiff's husband while he was intoxicated,

whereby he became crazed, in consequence of which the plaintiff was injured in her person and means of support.

Held, on demurrer for a defect of parties, that, under section 20 of such act, the wife may maintain such action without joining her husband.

Held, also, on demurrer for want of facts, that such actions can be maintained only when the sale complained of is made in violation of such statute, and that the complaint is sufficient. *Mitchell v. Ratts*, 259

10. *Retailing without License.—Who may grant License.*—An indictment for retailing intoxicating liquor without license charged, that the sale complained of had been made by the defendant, without having "procured a license therefor from the board of commissioners," etc.

Held, on motion to quash, that, on appeal from the decision of a board of commissioners on an application for such license, the circuit court may grant the same to the applicant, and that therefore the indictment is insufficient. *Meier v. The State*, 386

11. *Application for License.—Juror.—Challenge.*—Where, on appeal to the circuit court of an application for license, a juror, on being examined as to his competency to serve, answers, that he is "opposed to granting license to any person, under any circumstances," a challenge to him for cause should be sustained. *Keiser v. Lines*, 431

12. *Same.—Immorality of Applicant.—Unlawful Sale.*—The fact as to whether or not an unlawful sale of intoxicating liquor, made by the applicant, is such an immorality or unfitness on his part as should defeat his application, is a question for the jury alone, the decision of which should not be influenced by an affirmative instruction of the court. *Id.*

13. *Sale without License.*—A sale of intoxicating liquor in a less quantity than a quart, without license, is not necessarily an unlawful act. *Id.*

14. *Same.—Indictment.—Duplicity.*—An indictment charged, that the defendant, "not being then and there licensed according to the laws of Indiana," etc., unlawfully sold intoxicating liquor, in a less quantity than a quart at a time, "to be then and there drunk," etc., on the premises of the defendant.

Held, on motion to quash, that the indictment is not bad for duplicity.

Held, also, that the indictment sufficiently avers that the defendant was not licensed to sell intoxicating liquors. *The State v. Wickey*, 596

LIMITATIONS.

See STATUTE OF LIMITATIONS.

MALICIOUS PROSECUTION.

1. *Inquisition of Lunacy.—Damages.*—One who maliciously, and without probable cause, institutes or procures to be instituted against another an inquisition of lunacy, is liable to the latter on his discharge, in an action for malicious prosecution, for all damages suffered by him in excess of the taxable costs of such proceeding. *Lockenour v. Sides*, 360
2. *Parol Evidence of Record.*—On the trial of an action to recover damages for an alleged malicious prosecution of the plaintiff by the defendant, it was established by parol evidence, without objection by the defendant, that he had caused the plaintiff to be arrested for a crime, and that, owing to the failure of the defendant to appear as a witness against the plaintiff, the cause had been continued from time to time, until the plaintiff was finally allowed to go at liberty.

Held, that the evidence sufficiently shows an end of such prosecution.

Leever v. Hamill, 423

MANDAMUS.

See CITIES AND TOWNS, 4 to 10; TAXES, 4.

MARRIAGE.

See JUSTICE OF THE PEACE, 5.

1. *Marriage Contract.—Breach.*—In an action for a breach of a marriage contract, a finding by the jury, that "there was a marriage contract made between the plaintiff and defendant," is a finding, in effect, that mutual promises of marriage were made by the parties, and therefore the defendant can not complain that the court, in its instructions to the jury, referred to such contract as a promise by the defendant to marry the plaintiff. *Wilds v. Bogan*, 453
2. *Same.—Damages.*—The defendant in such action, where seduction under promise of marriage, and the birth of a bastard child, are alleged in aggravation of damages, can not complain of an instruction to the jury, that if the plaintiff had been seduced by the defendant under such promise, and had given birth to a bastard child belonging to him, they might, in assessing the plaintiff's damages, take into consideration the plaintiff's feelings, pain and humiliation in giving birth to such child, but not the care and cost of maintaining and educating it. *Ib.*

MARRIED WOMAN.

See HUSBAND AND WIFE.

MECHANIC'S LIEN.

1. *Repairs.—Mechanic Employed by Tenant.—Notice.*—In an action by a mechanic, against the owner of certain separate tracts of real estate, and his tenant, to recover for the value of labor performed by the plaintiff, in repairing one, and in erecting another, building on such realty, and to enforce a mechanic's lien, the complaint alleged that the defendants were "indebted to him" for the value of such labor; that it had been performed at the request of the tenant; that the landlord "was aware of and consented to" the making of such improvements; that the same were made while the premises were occupied, "free of rent," by the tenant, who was then and there engaged in his individual business; that the tenant, "with the knowledge, consent and assistance of" the landlord, was making improvements on such premises; that plaintiff's labor had been performed as a necessary part thereof; and that the plaintiff had filed for record a notice of his intention to hold a lien on the whole of such realty, for the entire value of such labor.

Held, on joint demurrer, that though the cause of action stated in the complaint is only sufficient to authorize a personal judgment against the tenant, the demurrer should be overruled.

Held, also, on separate demurrer by the owner, that, on the facts stated in the complaint, he is not personally liable.

Held, also, that, on the facts stated, a mechanic's lien against such realty can not be enforced.

Held, also, that the notice of such intended lien is insufficient.

Held, also, that, by section 648, (2 R. S. 1876, p. 267,) concerning mechanics' liens, a mechanic's lien can not be acquired, as against the owner of real estate, for repairs made by the mechanic, on a contract with the tenant.

Held, also, that a lien for the total value of such repairs and the labor on such new building can not be enforced against such buildings, either separately or jointly. *Willerson v. Rust*, 172

2. *Personal Liability of Owner.*—The owner of a building erected under a contract between him and a contractor is not liable to a sub-contractor, in an action by him on account merely, for work and labor done on, and materials furnished for, such building, at the request of the contractor. *The City of Crawfordville v. Brundage*, 262

3. *Pleading*.—A complaint to enforce a mechanic's lien for the value of labor and materials, which does not aver that the labor was done on, and the materials furnished for, the building against which the lien is sought, is insufficient. *Ib.*
4. *Notice.—Recording*.—A notice of intention to hold a mechanic's lien upon a building must be duly recorded within sixty days after the completion of the same. *Ib.*
5. *Notice.—Burden of Proof*.—A mechanic's lien for labor or materials can not be enforced unless the notice of such lien has been filed for record within sixty days after the completion of the labor or the furnishing of the material; and that fact must be affirmatively shown by the person seeking the enforcement of such lien. *Killian v. Eigenmann*, 480

MINOR.

See CRIMINAL LAW, 41, 42; DIVORCE, 1, 2, 3; LIQUOR LAW, 4.

MISJOINDER.

See CONTRACT, 10; NEGLIGENCE, 1 to 4; PLEADING, 7.

MISTAKE.

See MORTGAGE, 2.

MORTGAGE.

See DECEDENTS' ESTATES, 12; HUSBAND AND WIFE, 1; PLEADING, 13, 15; REDEMPTION; VENDOR AND PURCHASER, 3.

1. *Foreclosure.—Supreme Court*.—Where, in an action to foreclose a mortgage on land, judgment is rendered by default against a party made defendant to answer as to his interest in the premises, he can not complain thereof, on appeal to the Supreme Court, if the record does not disclose that he had any interest therein. *Baker v. Armstrong*, 189
2. *Mistake.—Action to Reform*.—Where, in an action to reform and foreclose a mortgage on real estate, to which several successive holders, under the mortgagor, of the equity of redemption are made parties, the Supreme Court, on appeal, where the evidence is not in the record, and where, under the pleadings, all the equities between the parties might have been given in evidence, will presume in favor of the record. *Ib.*
3. *Recording Assignment*.—Prior to the taking effect of the act of March 6th, 1877, (Acts 1877, Reg. Sess., p. 99,) which provides for recording assignments of mortgages, there was no statute requiring such record and making it notice, and therefore assignees were guilty of no laches in not recording assignments made theretofore. *Dizon v. Hunter*, 278
4. *Foreclosure by Assignee.—Junior Mortgage.—Former Adjudication*.—In an action for foreclosure, prior to the taking effect of such act, by an assignee who had not placed his assignment on record, against the mortgagee, mortgagor and a junior mortgagee, the latter answered, that theretofore, after the date of the assignment to the plaintiff, in an action by a third person against the senior mortgagee and the mortgagor, such senior mortgage had been adjudged satisfied, and that, relying upon such decree and without notice of the assignment to plaintiff, he had, in good faith, taken his mortgage.
Held, on demurrer, that the answer is insufficient. *Ib.*
5. *Foreclosure.—Promissory Note.—Mortgage by Assignor to Assignee*.—The payee of certain promissory notes, having assigned the same to another by a blank endorsement, executed to the assignee, to secure the payment of such notes, a mortgage on certain real estate, conditioned that if the payee "shall pay said notes according to their tenor and effect, or cause the same to be paid, this mortgage shall be void," etc.
Held, in an action upon such note, and to foreclose such mortgage, by the

assignee, against the maker and payee, that the plaintiff is entitled to personal judgment against both defendants for the amount due on such note, to foreclosure of such mortgage against the payee, and to execution over against the maker for any part of such judgment remaining unsatisfied by the sale of the mortgaged premises.

Held, also, that the liability of such payee is primary, and not merely that of an endorser. *Robertson v. Cauble*, 420

6. *Indemnity.—Subsequent Encumbrance.*—Where the owner of real estate, in consideration of the agreement of another to become an endorser, to a specified amount, of negotiable paper of the former, executes to the latter a mortgage on such real estate, to indemnify him against loss, not only from such future endorsements, but also from similar endorsements already made, such future endorsements, when made, relate back to the execution of such mortgage, and are valid liens against encumbrances placed upon the mortgaged property subsequent to the execution of such mortgage, by persons having either actual or constructive notice thereof, though such endorsements be made by the mortgagee subsequent to the placing of such encumbrances, and with notice thereof. *Brinkmeyer v. Helbling*, 435

7. *Release Procured by Fraud.—Subsequent Purchaser.*—In an action by the holder of a mortgage on real estate, to foreclose it against the mortgagor and the owner of the equity of redemption, the complaint alleged, that, prior to the conveyance of such equity, the plaintiff had been induced to execute a release of his mortgage, by the false and fraudulent representations of the mortgagor, that he had negotiated with a third person for a loan on such land, with which to pay the plaintiff's debt, but that, to secure such loan, plaintiff must release his mortgage, so that the mortgagor could execute a first mortgage to such third person for such loan, with which he promised at once to pay the plaintiff's debt; that the mortgagor had never made any such negotiation; and that, on the release of such mortgage, he had conveyed such land to his codefendant, who yet owed the purchase-money therefor.

Held, on demurrer, that fraud in the mortgagor is sufficiently charged, and that the complaint is sufficient as to both defendants.

Reagan v. Hadley, 509

8. *Same.—Parties.*—Where, by a simple answer to the complaint in such action, the defendant owner of the equity of redemption admits the purchase of such land for a certain sum, and alleges that he had executed to the mortgagor his promissory note therefor, and that the same had been sold and assigned to a certain person, without notice of such mortgage, it was not error to strike out of such answer a prayer, that such assignee be made a party to the action to answer as to his interest. *Ib.*
9. *Same.*—A reply to such answer, alleging the same facts as those set out in the complaint, and averring that such conveyance had been made by the mortgagor to his codefendant with the full knowledge by the latter of such fraud, is sufficient on demurrer. *Ib.*
10. *Same.—Consideration for Assignment.*—A reply to such answer, alleging that such promissory note had been assigned to a person who received it without giving any new consideration therefor, but simply in discharge of an existing debt then due from the mortgagor to the assignee, is insufficient. *Ib.*
11. *Estoppel.*—The court, in such cause, instructed the jury, that, if the mortgagor had not committed the fraud alleged, the owner of the equity of redemption was not liable to the plaintiff; that if he had committed such fraud, but the owner of the equity, without knowledge thereof and before the assignment of such note, had induced the assignee to take such assignment by assuring him that he had no de-

fence thereto and would pay him at maturity, then he was estopped from asserting any defence, as against the assignee, and was not liable to the plaintiff; but that, if he had given the assignee no such assurances before such assignment, he was liable for the amount of such note to the plaintiff, notwithstanding the good faith of himself and the assignee, and notwithstanding any thing occurring after the assignment; and that such recovery by the plaintiff would be a good defence to an action against him on such note by the assignee.

Held, that the instruction was right. *Ib.*

12. *Description.—Action to Quiet Title.—Conveyance.*—A mortgage to the State, executed for a loan of school funds, simply described the premises mortgaged by subdivisions, without naming the county and State wherein they were located.

Held, in an action by the mortgagor to quiet his title, against a purchaser of the mortgaged premises at a sale thereof by the county auditor, that the mortgage is void for uncertainty in the description of such premises, and, therefore, that such sale by the auditor was a nullity, and vested no title in the purchaser. *Murphy v. Hendricks*, 593

13. *Same.—Congressional Survey.*—The congressional survey of the lands lying north-west of the Ohio river, under the various acts of Congress, is part of the public law, of which the courts of this State must take notice. *Ib.*

MURDER.

See CRIMINAL LAW, 15 to 18.

NAME.

See CRIMINAL LAW, 22, 23, 28; PLEADING, 1.

NATIONAL BANK.

See DECEDENTS' ESTATES, 8.

NEGLIGENCE.

See PLEADING, 3.

1. *Parent, Wife and Child.—Joinder of Actions.*—Where, by means of the same negligent act of one person, bodily injuries are inflicted upon another, his wife and his minor child, resulting in the loss to him of his wife's services, and the expenditure by him of means and labor in healing and caring for himself and his child, all constitute but a single cause of action, and may be united in a single paragraph of a complaint for damages. *The Cincinnati, etc., R. R. Co. v. Chester*, 297
2. *Same.—Death of Child.—Misjoinder of Actions.*—An action by the father, to recover damages for the death of his minor child, caused by the negligence of another, is statutory, and can not be joined with an action by him to recover for personal injuries received by himself, though caused by the same negligent act. *Ib.*
3. *Same.—Practice.—Motion to Separate.*—Where a complaint contains several causes of action, a proper motion to separate them will lie; but, if made too broad, it should be overruled. *Ib.*
4. *Railroad.—Pleading.—Motion to make Specific.*—In an action against a railroad company, to recover damages for injuries received by the plaintiff while travelling on the defendant's road, alleged to have been caused by the negligence of the defendant, the complaint alleged, that, "without any fault, carelessness or negligence on his part," etc., the car in which he was riding was, "by and through the fault, carelessness and negligence of" the defendant, her agents and employees, thrown from the track, thereby causing the injuries complained of.

Held, on demurrer, that the allegation of negligence is sufficient.

Held, also, that a motion to make the complaint more specific in its al-

legation of negligence on the part of the defendant should have been sustained. *Ib.*

NEW TRIAL.

See CRIMINAL LAW, 7, 10, 11, 12; EVIDENCE, 9; INSTRUCTION TO JURY, 1; PRACTICE, 3, 6, 9, 13, 17; SUPREME COURT, 6, 7, 9, 13, 17.

1. *Motion.—Evidence.*—A motion for a new trial, based upon the alleged erroneous admission or exclusion of evidence, must clearly specify the evidence in question. *Grant v. Westfall*, 121
2. *Same.—Instruction to Jury.*—A motion for a new trial, based upon the alleged erroneous giving or refusal of an instruction to the jury, must clearly specify the instruction in question. *Ib.*
3. *How Many for Same Cause.*—Where two new trials have been granted in the same cause, to the same party, by either the Circuit or Supreme Court, exclusively for any of the reasons specified in section 352 of the practice act, another new trial can not be granted to him for any of the reasons specified in such section; but even then the latter court may reverse a judgment for erroneous rulings of the court below on the pleadings, or on other matters which do not constitute reasons for a new trial, although the reversal may result in another trial of the cause on its merits. *Headrick v. Wischart*, 129
4. *Motion.—Cause.*—A motion for a new trial, based upon alleged error in the exclusion of evidence, the giving of instructions to the jury, or of law occurring at the trial, must specify particularly the error complained of. *Vaughn v. Ferrall*, 182
5. *Exception to Instruction.—When Taken.*—The giving of an erroneous instruction to the jury must be excepted to before the return of the verdict, to make such error available as cause for a new trial; and an omission to so except is not cured by an exception to the overruling of the motion for a new trial. *Ib.*
6. *Cause.—Ruling on Demurrer.*—Error of the court in its ruling on a demurrer is not cause for a new trial. *Line v. Huber*, 261
7. *Evidence.*—Where the evidence is not in the record, on appeal to the Supreme Court, no question is presented as to whether the verdict is sustained by the evidence, or is contrary to law. *Ib.*
8. *Is the Verdict Supported by the Evidence?—Rule in Circuit Court.*—A motion for a new trial, upon the alleged ground that the evidence is insufficient to support the verdict, should be granted by the circuit court, unless it clearly appears that substantial justice has been done. *Christy v. Holmes*, 314
9. *Same.—Rule in Supreme Court.*—Where the same question is presented to the Supreme Court, on appeal, that court should not grant a new trial, unless it clearly appears from the record that substantial justice has not been done. *Ib.*
10. *Instruction to Jury.*—Error in refusing instructions asked to the jury is not available as ground for a new trial, where the court, of its own motion, gives proper instructions covering the same ground as those refused. *Gebhart v. Burkett*, 378
11. *Cause.—Motion to Dismiss.*—The ruling of the court on a motion to dismiss an action is not ground for a new trial. *Bray v. Black*, 417
12. *Misconduct of Jury.*—The fact that, when retiring to consult as to their verdict, a jury, by mistake, took to their room the instructions of the court to the jury, but did not use the same, is not ground for a new trial. *Wilds v. Bogan*, 453

NOTICE.

See ARBITRATION, 1, 2, 3; CRIMINAL LAW, 6; EVIDENCE, 16; FORMER ADJUDICATION, 1; JUDGMENT, 2, 7, 8; MECHANIC'S LIEN, 1, 5; MORTGAGE, 3, 4, 6, 11; PARTNERSHIP, 1; PLEADING, 3; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 5, 8.

NUNC PRO TUNC ENTRY.

See JUDGMENT, 2.

OFFICER.

See COUNTY CLERK; MORTGAGE, 12; STATUTE OF LIMITATIONS, 1, 2.

PARENT AND CHILD.

See DIVORCE, 1, 2, 3; NEGLIGENCE, 1, 2.

PARTIAL PAYMENTS.

See CONTRACT, 8.

PARTIES.

See CONTRACT, 7; JUSTICE OF THE PEACE, 5, 6; LIQUOR LAW, 9; MORTGAGE, 8; PROMISSORY NOTE, 10, 11, 12; REAL ESTATE, ACTION TO RECOVER, 2.

1. *Defect of.—Pleading.*—An action commenced before a justice of the peace, on a judgment in favor of the plaintiff and another, against the defendant and another, without any allegation in the complaint as to why the other judgment creditor is not joined as a co-plaintiff, should be dismissed on motion for defect of parties plaintiffs, or a demurrer thereto assigning that reason should be sustained. *Gilbert v. Allen*, 524
2. *Same.—Demurrer.—Plea in Abatement.*—If, in such case, such omitted judgment defendant be living, but that fact does not appear by the complaint, an objection that there is a defect of parties defendants must be presented, not by demurrer, but by a plea in abatement alleging such fact. 16.

PARTITION.

See ADEMPMENT; COUNTY CLERK; DESCENTS, 1; JURY, 2.

PARTNERSHIP.

See DECEDENTS' ESTATES, 9.

1. *Dissolution.—Notice of.—Retiring Partner.*—A retiring partner, who desires to avoid liability for future debts of the new firm, which may be contracted by it to persons who have had dealings with the old firm, must cause notice of his retirement to be given to such persons. *Stall v. Cassady*, 284
 2. *Individual Debts.—Levy on Partnership Property.*—An execution creditor of an individual member of a copartnership, having caused property of such copartnership to be levied on by an officer, to satisfy his debt, was, together with such officer, on application of another partner, temporarily enjoined from making sale until the partnership debts had been paid, and directed to deliver such property to a receiver appointed in such proceeding to settle the partnership affairs. On appeal by such creditor alone to the Supreme Court, such injunction was reversed as to him, and the cause remanded for further proceedings. Such receiver having subsequently sold such property and reported a distribution of the proceeds of the sale to the partnership creditors, such execution creditor instituted an action against such copartner and his surety, on the bond executed by them to procure such injunction, to recover damages resulting therefrom.
- Held*, that, no reversal of such injunction having been obtained as to such officer, or as to the appointment of such receiver, and such creditor

having continued to be a party to such action, resulting in the sale of such property and the distribution of the proceeds thereof, the judgment therein rendered after such reversal, the reports of such sale by the receiver, and the approval thereof by the court, were competent evidence against, and bound, him. *Donellan v. Hardy*, 393

3. *Same.—Lien.*—By the levy of his execution upon partnership property, the creditor of an individual partner acquires no interest whatever in the property itself, but only a lien for the share of such partner, individually, in the surplus remaining after all partnership debts and prior liens shall have been paid. *Id.*
4. *Contract.—Losses.*—A. and B. entered into a partnership for manufacturing purposes, under an agreement that the former should furnish all capital necessary for the purchase of machinery and material, and for carrying on the partnership business; that the latter should superintend the business; and that all losses should "be borne equally by them." A. purchased certain real estate, taking the title in himself, and erected thereon the necessary buildings and machinery, at his own expense. The machinery having been damaged by fire, and B. having sued A. for an accounting, the court instructed the jury that B. should share equally with A. in such loss. *Held*, that the instruction was not erroneous. *Cartisle v. Tenbrook*, 529
5. *Conveyance by one Partner.*—A conveyance of real estate, used by and belonging to a copartnership, by a member thereof, passes simply his own interest therein. *Goddard v. Renner*, 532
6. *Redemption.*—Where copartnership real estate, which has been sold on an execution issued on a judgment against the firm, is conveyed by a member of the firm to a grantee who redeems the same from such sale, such redemption is a voluntary payment in which the grantee will not be protected, and such real estate may then be sold on execution for any unsatisfied balance of such judgment. *Id.*
7. *Same.—Estoppel.*—Where, in such case, the purchaser at such sheriff's sale accepts the redemption-money from such grantee, his certificate of sale from the sheriff is annulled, and he is estopped from afterward denying such grantee's right to redeem. *Id.*

PARTY-WALL.

See CONTRACT, 6.

PAUPER.

Medical Attendance Upon.—Liability of County.—Where no physician to attend upon the paupers of a county has been employed by its board of commissioners, or where, one having been so employed, he has abandoned such employment, the trustee of a civil township may employ a physician to attend upon the paupers of his township requiring medical treatment, and the county is liable to such physician for the value of services rendered by him under such employment.

Conner v. The Board, etc., 15

PAYMENT.

See CONTRACT, 8; COUNTY CLERK; JUDGMENT, 4; PARTNERSHIP, 6; STATUTE OF LIMITATIONS, 4, 5, 6; TAXES, 1.

PEDLER.

See CITIES AND TOWNS, 1, 2.

PERJURY.

See CRIMINAL LAW, 4.

PETITION FOR REHEARING.

See EVIDENCE, 16.

PHYSICIAN.

See PAUPER.

PLEADING.

See ARBITRATION, 15; BANKRUPTCY; BASTARDY; CITIES AND TOWNS, 3, 4, 5, 7, 9, 10, 11 to 15; CONTEMPT, 2; CONTRACT, 2, 9; DECEDENTS' ESTATES, 8, 9, 11; DIVORCE, 8; FORMER ADJUDICATION; FRAUD, 2; JUDGMENT, 5, 9; LIQUOR LAW, 9; MECHANIC'S LIEN, 1, 3; MORTGAGE, 4, 7 to 10; NEGLIGENCE; PARTIES; PRACTICE, 2, 5, 7, 11, 12, 16; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY, 3; PROMISSORY NOTE, 1, 2, 4, 5, 10; RAILROAD, 1, 9; REAL ESTATE, ACTION TO RECOVER, 1, 2, 3; REPLEVIN; SPECIFIC PERFORMANCE, 1; STATUTE OF LIMITATIONS, 2, 3, 4, 7; SUPREME COURT, 2, 14, 19, 21; TELEGRAPH COMPANY, 2, 3; TURNPIKE, 1 to 4, 6; USURY, 1; VENDOR AND PURCHASER, 2.

1. *Names of Parties.—Justice of the Peace.*—A complaint filed in the court of a justice of the peace, by the administrator of a decedent's estate, set out the initials only of the plaintiff's christian name; but the defendant, in a written answer by him filed, set out the full names of all the parties.

Held, that the complaint was defective, but that such defect was cured by the answer. *Sherrod v. Shirley*, 13

2. *Bill of Particulars.*—Where in such action, the complaint professes, but fails, to set out a bill of particulars of an account, on which the action is brought, it is insufficient. *Ib.*

3. *Turnpike.—Negligence.*—In an action against a turnpike company, to recover damages for an injury received by the plaintiff while travelling on the road of the defendant, alleged to have been caused by a defect in such road, which, as alleged, the defendant had negligently suffered and permitted to become and remain out of repair, the facts alleged in the complaint showed, that prior to travelling over such road and receiving such injury, the plaintiff had notice of such defect.

Held, on demurrer, that the complaint is insufficient, the allegations thereof showing the plaintiff to have been guilty of contributory negligence. *Jonesboro, etc., Turnpike Co. v. Baldwin*, 86

4. *Same.—Evidence.*—On the trial of such action, the evidence showed, that the plaintiff, with notice of such defect, and with an opportunity to have avoided injury by travelling upon another and equally convenient road, had passed over the road of the defendant, merely because he preferred so to do, and had been injured in so doing, by reason of such defect.

Held, that he was guilty of contributory negligence, and can not recover. *Ib.*

5. *Same.*—In such an action, facts tending to establish contributory negligence on the part of the defendant are admissible in evidence under the general denial, without being specially pleaded. *Ib.*

6. *Former Adjudication.—Dismissal.*—In an action against the makers of a promissory note, the defendants filed an answer of former adjudication in an action by the plaintiff, against the defendants, before a justice of the peace, on the same note, wherein judgment was rendered against but one of the defendants, and that, on appeal by him to the circuit court, the action was there dismissed by the plaintiff.

Held, on demurrer, that the answer is insufficient.

Held, also, that such dismissal released none of the makers.

Whitworth v. Sour, 107

7. *Misjoinder of Actions.—Supreme Court.*—No judgment can be reversed

- for error committed in either sustaining or overruling a demurrer for misjoinder of causes of action. *Wilkinson v. Rust*, 172
8. *Joint Demurrer by All.*—If a complaint against two or more defendants state facts constituting a good cause of action against any one of them, a joint demurrer by all, for want of sufficient facts, should be overruled. *Ib.*
 9. *Erroneous Judgment.—How Objected to.*—Where, by the complaint, the plaintiff is entitled to some kind of relief or judgment against a defendant, but the court renders a judgment different from, or beyond, that authorized by the complaint, the defendant may avail himself of the error, by excepting to the judgment as rendered. *Ib.*
 10. *Practice.*—A pleading, replied generally to the whole of an answer of several paragraphs, is not insufficient on demurrer merely because some of such paragraphs require, and admit of, no reply. *Vaughn v. Ferrall*, 182
 11. *False Return by Sheriff.—Widow.—Motion to Make Certain.*—Complaint by the widow of a testator, against the sheriff and his deputy, alleging that such deputy had collected a certain sum of money, which by law belonged to her as widow, on an execution against a third person in favor of the executor of her husband's estate, and that such deputy, having fraudulently forged her name to a pretended receipt on such execution for such money, had unlawfully returned such execution to the clerk's office without having paid her the same.
Held, on motion in arrest of judgment, that the complaint is sufficient after verdict
Held, also, that, to have reached defects in the complaint, as to the averments of ownership, a motion to cause it to be made more certain should have been made before issue was joined. *Doman v. Bedunnah*, 219
 12. *Motion in Arrest.*—A motion in arrest of judgment for defects in a complaint reaches such only as are not cured by the finding or verdict, nor waived by failure to demur. *McCormick v. Mitchell*, 248
 13. *Promissory Note.—Mortgage.*—In an action on a promissory note, and to foreclose a mortgage on real estate, a demurrer to the complaint, for want of sufficient facts, should be overruled, if such complaint be sufficient as to the note, though insufficient as to the mortgage. *Hodshire v. Ewan*, 561
 14. *Practice.*—Where the answer in an action consists of a general denial and a special paragraph amounting only to a general denial, there is no error in sustaining a demurrer to the latter. *Ib.*
 15. *Mortgage to Indemnify.*—A debtor, to secure a debt owing to A., having mortgaged to the latter certain real estate which he then conveyed to B., subsequently mortgaged certain other real estate to a surety upon a debt owing to C., with a provision in the latter mortgage, that, upon payment of such debt due to C., such surety should assign such mortgage to B., to secure him against such mortgage held by A., and providing that such former mortgage should be foreclosed "upon any proceedings for the collection of either debt for which" it was executed as security.
Held, in an action by A., to collect his debt, that it is not secured by such latter mortgage, and that he is not entitled to foreclose the same. *Ib.*
 16. *Amended Complaint.—Relief.—Judgment.*—By the filing of an amended complaint, the original complaint is superseded and forms no part of the record of, or issues in, the cause, and relief demanded in the latter, but omitted from the former, can not be granted by the finding or judgment. *Westerman v. Foster*, 408
 17. *Conveyance.—Condition Subsequent.*—Where, because of an alleged breach of a condition subsequent contained in a conveyance of real

estate, the heir of a deceased grantor seeks to recover the possession of, and to quiet his title to, such real estate, the complaint should allege that such grantor, at the time of making such conveyance, was seized in fee-simple of such real estate. *Clark v. Holton*, 564

18. *Same*.—*Entry*.—The complaint in such action should also allege an entry upon, or claim to, the real estate, made by the plaintiff, prior to bringing suit. *Ib.*
19. *Same*.—*Demand*.—In such case, a demand for possession of the real estate, made before bringing suit, is, in this State, equivalent to an entry thereon. *Ib.*

PRACTICE.

See ARBITRATION; CONTEMPT; CONTRACT, 7, 10; CRIMINAL LAW, 3, 10, 21; EVIDENCE, 1, 14, 15; INSTRUCTION TO JURY, 1; INTERROGATORIES TO JURY, 2; JUDGMENT, 2, 5, 6, 7 to 10; MORTGAGE, 8; NEGLIGENCE; NEW TRIAL; PLEADING, 1, 5, 7 to 12, 14, 16; PROMISSORY NOTE, 10, 11, 12; REAL ESTATE, ACTION TO RECOVER, 1 to 4; SUPREME COURT; TURNPIKE, 1; USURY, 1, 3, 5.

1. *Evidence*.—*Foreign Judgment*.—*Statute of Foreign State*.—On the trial in the circuit court of an action upon an account, commenced before a justice of the peace, the defendant, on the close of the plaintiff's evidence in chief, offered in evidence a transcript of garnishment proceedings before a justice of the peace of a foreign state, showing a judgment against the defendant at the suit of a creditor of the plaintiff, and that the amount thereof had been paid into court by the defendant, appropriated, etc., but, on objection, it was unconditionally excluded.

Held, that such ruling was erroneous.

Held, also, that the evidence should have been admitted, upon condition that proof would be introduced that the law of such state conferred upon the justice jurisdiction to render such judgment.

The Pittsburgh, etc., R. W. Co. v. Conway, 52

2. *Demurrer*.—*Form of*.—A demurrer to a reply consisting of several paragraphs, assigning that "neither of said paragraphs constitutes a good reply to said answer," is informal and defective, and should be overruled. *Vaughn v. Ferrall*, 182
3. *New Trial*.—*Assignment of Error*.—Error in refusing to give an instruction asked to the jury is cause for a new trial, but is not a proper assignment of error on appeal to the Supreme Court. *Freeze v. DePuy*, 188
4. *Evidence*.—Where, on appeal to the Supreme Court, neither the evidence, nor the instructions given to the jury, are in the record, the refusal of the court below to give to the jury an instruction asked is not available as error. *Ib.*
5. *Pleading*.—*Defective Prayer*.—An objection to a defective prayer for relief must be presented, not by demurrer, but by a motion to make the pleading more specific. *Baker v. Armstrong*, 189
6. *New Trial*.—*Evidence*.—Objections to the admission of evidence given on the trial of a cause must be accompanied by a statement of the ground of objection, to render the admission of the same available as cause for a new trial, or on appeal to the Supreme court. *Miller v. The Wild Cat G. R. Co.*, 241
7. *Motion to Strike Out*.—A motion to strike out part of a pleading should specify some reason therefor. *Brinkmeyer v. Helbing*, 435
8. *Evidence*.—Where the evidence is not in the record, on appeal to the Supreme court, no question is presented as to whether or not the verdict is contrary to law or the evidence, or as to the amount of the damages assessed. *Wilds v. Bogan*, 453
9. *Same*.—*New Trial*.—*Cause*.—Causes assigned as grounds for a new trial,

- alleging the improper admission or exclusion of evidence, should designate the particular evidence intended. *Ib.*
10. *Recalling Witness*.—The court, during the progress of a trial may, in its discretion, permit a witness who has once testified to be recalled. *Killian v. Eigenmann*, 480
 11. *Informal Demurrer*.—The sustaining of an informal demurrer to an insufficient paragraph of answer is not ground for reversing a judgment rendered upon an issue formed by the general denial. *Davis v. Green*, 493
 12. *Evidence*.—Where a demurrer is improperly overruled to an insufficient pleading, but all the evidence admitted thereunder on the trial was properly admissible under other pleadings, such error is not available on appeal to the Supreme Court. *Reagan v. Hadley*, 509
 13. *Instruction to Jury*.—Error in giving or refusing instructions to the jury is proper ground for a new trial, but can not be assigned as error on appeal to the Supreme Court. *Ib.*
 14. *Evidence*.—*Cross-Examination*.—Where, on appeal to the Supreme Court, it does not appear from the record, that a conversation, attempted to be elicited on cross-examination as occurring in connection with a matter concerning which the witness has testified, had occurred, there is no available error in the refusal of the court to permit such cross-examination. *Harper v. Harper*, 547
 15. *Agreed Case*.—Where, under section 386, (2 R. S. 1876, p. 190,) of the practice act of this State, an agreed case is submitted by the parties, to a court, for decision, "it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties," or the court will have no jurisdiction of the case. *Manchester v. Dodge*, 584
 16. *Same*.—*Evidence*.—*Agreed Statement of*.—Where, in an action put at issue by the filing of pleadings, an agreed case is submitted by the parties, but the affidavit required by section 386 of the practice act is not filed therewith, such agreement can only be regarded, at most, as an agreed statement of evidence, and, if such evidence fails to sustain the material allegations of the complaint, a finding must be made for the defendant. *Ib.*
 17. *Same*.—*New Trial*.—The correctness of the finding on such agreed statement of evidence can be questioned only by a motion for a new trial, and, if no such motion be made, no question as to such finding is presented to the Supreme Court, on appeal. *Ib.*

PRESUMPTION.

See ADEMPMENT, 3; CITIES AND TOWNS, 11; JUDGMENT, 3, 4; MORTGAGE, 2; STATUTE OF LIMITATIONS, 5.

PRINCIPAL AND AGENT.

See CITIES AND TOWNS, 10; CONTRACT, 3, 4; DECEDENT'S ESTATES, 8.

Real Estate Broker Acting for both Vendor and Vendee.—In an action by a vendor of certain real estate, to recover for moneys alleged to have been collected by the defendant as the broker of the former, and unlawfully detained, the defendant answered, that the plaintiff, with full knowledge that the defendant was acting as the broker of the purchaser in making investments for the latter in real estate, had employed the defendant, at a stipulated commission, to sell such real estate at a specified price; that he had made such sale, receiving from the purchaser a sum exceeding the price of the realty, had paid such price, less his commission, over to the plaintiff, and had retained the excess as the price of his services rendered to the purchaser in making the investment.

Held, that an instruction to the jury trying such cause, that such answer admitted the possession and retention by the defendant of moneys received by him from the sale of such real estate, was erroneous.

Held, also, that, in such case, the defendant might lawfully receive compensation for his services from both vendor and vendee.

Alexander v. The North-Western, etc., University, 466

PRINCIPAL AND SURETY.

See JUSTICE OF THE PEACE, 4; STATUTE OF LIMITATIONS, 2; VENDOR AND PURCHASER, 3.

1. *Delivery Bond.—Sale of Surety's Property.*—Where the real estate of the surety has been levied upon and sold at sheriff's sale, on an execution issued upon a judgment rendered against the principal and surety in a delivery bond, in an action thereon for a breach of its condition, the latter may, in an action against the former, recover as for money paid to his use. *Collins v. Paris*, 151
2. *Proceeding to try Suretyship.—Former Adjudication.*—Where, in an action on a promissory note against several apparently joint makers, one of the defendants appears, and, upon default of his codefendants, and without any notice to them other than the original summons in the cause, alleges, and obtains a judgment against them, that they are principals and he a surety only, and asks and obtains a decree that execution be first levied on their property, such judgment and order, as between the defendants, are utterly void for want of proper notice, and will not support a plea of a former adjudication of such matter. *Joyce v. Whitney*, 550
3. *Same.—Pleading.*—The complaint of one defendant against another, to establish the alleged suretyship of the former, is not a mere cross-complaint, but is a new and original proceeding which can not be tried upon the summons issued by the plaintiff. *Id.*

PROCESS.

See FORMER ADJUDICATION, 1; JUDGMENT, 8; JUSTICE OF THE PEACE, 2; PRINCIPAL AND SURETY, 2, 3; RAILROAD, 6.

PROMISSORY NOTE.

See CONTRACT, 2, 3; FORMER ADJUDICATION; HUSBAND AND WIFE, 1; JUSTICE OF THE PEACE, 3, 4; MORTGAGE, 5, 8 to 11; PLEADING, 6, 13; SPECIFIC PERFORMANCE, 4; USURY, 1, 3.

1. *Turnpike.—Assessment.—Estoppel.*—The defendant, in an action by a turnpike company as payee, on a promissory note, answered, admitting the execution of such note, and alleging that the consideration of the same was an assessment upon his real estate, to aid in the construction of the plaintiff's road, but averring that the same was void, on account of the fact that the assessors of benefits for the plaintiff's road had omitted to list and assess certain lands within one and one-half miles of such road, and that, at the time such note was executed, the defendant did not know of such omission.
Held, on demurrer, that the answer is sufficient.
Held, also, that the defendant is not estopped, by having executed the note in suit, from attacking the validity of such assessment.
Held, also, that, if such assessment has since been perfected, that fact should be replied. *Maddy v. The Sulphur Springs, etc., Turnpike Co.*, 148
2. *Alteration.—Estoppel.*—In an action by an assignee, on a promissory note payable in a bank of this State, where the defences pleaded by the defendant maker were want of consideration, and that, after the execution of the note and before its assignment, the payee thereof, with the knowledge of the plaintiff, but without the knowledge or consent of the defendant, had procured the execution of such note by a

third person, the plaintiff replied, that before procuring such assignment to himself, he had taken such note to the defendant, who, in answer to his enquiries concerning it, informed him that he had no defence thereto, and would pay it, and that, relying upon such statements, the plaintiff had procured an assignment of the note, for value.

Held, on demurrer, that the reply is sufficient. *Vaughn v. Ferrall*, 182

3. *Check.—Protest.*—No protest for non-payment of a check drawn upon a bank is necessary, to render the drawer liable to the payee.

Pollard v. Bowen, 232

4. *Same.—Copy.*—The protest of a dishonored check is not a written instrument which can be made the basis of an action, and, in an action by the payee, against the drawer, of such check, a copy of the protest forms no part of the complaint, and can not aid its averments. *Ib.*

5. *Same.—Notice of Non-Payment.*—If, in such action, the complaint fails to aver that the defendant has been notified of the non-payment of such instrument, or alleges no excuse for the failure to give such notice, it is insufficient on demurrer. *Ib.*

6. *Same.—Diligence.*—The same rule applies to checks as does to bills of exchange and endorsed promissory notes, in regard to the diligence to be used in presenting them for payment. *Ib.*

7. *Same.—Verbal Agreement not to Present.*—A verbal agreement between the payee and the drawer of a check, contemporaneous with its execution and delivery, that the former will not present it to the drawee for payment until a certain time, is a sufficient excuse for a delay until the time specified in presenting it for payment. *Ib.*

8. *Same.—Demand and Notice.—Remedy.*—Demand for the payment of a check, and notice of non-payment of the same, are no part of the contract between the drawer and payee, but are steps in the legal remedy of the latter. *Ib.*

9. *Administrator or Executor.—Personal Liability.*—Where, in renewal of a matured promissory note executed by his decedent, the administrator or executor of an estate, as such, executes to the payee a new promissory note, he thereby becomes personally liable, but the estate is not bound. *Cornthwaite v. The First Nat'l Bank, etc.*, 268

10. *Action by Devisee.—Parties.*—In an action upon an unendorsed promissory note, by a plaintiff alleging himself to be the owner thereof by devise from the payee, the representative of the latter should be made a party defendant, or the complaint should allege that there is no such representative; but a failure to object to such defect is a waiver thereof. *Bray v. Black*, 417

11. *Defect of Parties.*—Such objection is not presented by a motion to dismiss the action on the ground of the insufficiency of the complaint. *Ib.*

12. *Capacity to Sue.—How Questioned.*—An objection in such case that the plaintiff has not legal capacity to sue, on the alleged ground that letters of administration of the deceased payee's estate have not been granted to the plaintiff, is insufficient. *Ib.*

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 8.

PROTEST.

See PROMISSORY NOTE, 3 to 8.

QUO WARRANTO.

See TURNPIKE, 5.

RAILROAD.

See CITIES AND TOWNS, 4 to 10; CONTRACT, 7; DECEDENTS' ESTATES, 2; NEGLIGENCE, 4.

1. *Pleading.—Killing Stock.*—A complaint against a railroad company for injuring or killing stock, which does not allege that such injury or death was caused by the defendant's locomotives, cars or other carriages, is bad, even in the court of a justice of the peace, on demurrer, motion in arrest, or motion to dismiss.
The Pittsburgh, etc., R. W. Co. v. Troxell, 246
2. *Freight.—Roads.—Pooling Contract.*—Where, pursuant to an agreement between connecting railroads, freight is received by one, to be delivered at a point on the other for a sum less than the aggregate regular charges of both, the latter, upon receiving such freight, must deliver it, at such point, to the consignee, upon his tendering such sum to the proper agent of the latter. *The Evansville, etc., R. R. Co. v. Marsh*, 505
3. *Same.*—Where no such agreement exists, and freight is received by one of such railroads, to be delivered at a point on the other for a sum less than the aggregate regular charges of both, the latter company, on receiving it and carrying it to such point, must deliver it to the consignee, upon his tendering such sum, provided it equal the regular charges of the latter, whether it does or does not include any charges for the former. *Ib.*
4. *Same.—Replevin.*—If, in either of such cases, such tender be refused, the consignee may replevy such freight. *Ib.*
5. *Same.—Tender.*—Where, to maintain an action, a tender of money must be first made by the plaintiff, such tender must be kept good by bringing it into court. *Ib.*
6. *Killing Stock.—Summons.—Appearance.*—In an action against a railroad company, to recover for live-stock killed by the cars of the defendant, a failure to serve the summons on the defendant, by a delivery of a copy thereof to the conductor, as required by statute, is waived by the appearance of the defendant to the action.
The Louisville, etc., R. W. Co. v. Stover, 559
7. *Killing Stock.—Liability of Lessee.—Statute Construed.*—By the 1st section of the act of March 4th, 1863, (1 R. S. 1876, p. 751,) in relation to animals killed or injured on a railroad, it was intended, that, where a leased railroad is run or controlled by a lessee thereof, "in the corporate name of the owner," and not otherwise, such lessee should be liable, jointly or severally with such owner, for stock killed or injured on such railroad, by the cars, etc., thereof, at a place where the same is not, but ought lawfully to be, securely fenced.
The Pittsburgh, etc., R. W. Co. v. Bolner, 572
8. *Same.*—A railroad run or operated by a lessee thereof in its "own name" is not liable, under such statute, for stock so killed or injured. *Ib.*
9. *Same.—Evidence.*—In an action commenced before a justice of the peace, against a railroad company, to recover for live-stock alleged to have been so killed or injured by the defendant's cars, on the defendant's road, where the same was not, but ought lawfully to have been, securely fenced, the defendant may prove, without plea, in bar of the action, that such road was, at the time of such killing or injury, owned by another railroad company, but was being run by the defendant, as lessee, in her own name. *Ib.*
10. *Passengers.—Regulation.—Ticket.*—A railroad company may establish and enforce a regulation requiring a person desiring passage on its trains to procure, and to exhibit to its employees, before entering its cars, a ticket entitling him to such passage.
The Pittsburgh, etc., R. W. Co. v. Vandyne, 576

11. *Intoxication of Passenger*.—A railroad company may refuse to receive and carry as a passenger any person who is so intoxicated as to be disgusting, offensive, disagreeable or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage. *Ib.*
12. *Same*.—Slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify a railroad company in refusing to receive and carry him. *Ib.*

RAPE.

See CRIMINAL LAW, 22, 23.

REAL ESTATE, ACTION TO QUIET TITLE.

See MORTGAGE, 12; TAXES, 2.

REAL ESTATE, ACTION TO RECOVER.

See CONVEYANCE, 1, 2; PLEADING, 17.

1. *Pleading*.—*Disclaimer*.—*Costs*.—Where, in an action for the recovery of real estate, the defendant appears and answers, disclaiming all interest in, or title to, the premises in controversy, and alleging the possession thereof to be in a third person, not a party to the action, such answer amounts to a disclaimer, entitling the defendant to a judgment for costs. *McCarman v. Cochran*, 166
2. *Making New Parties*.—*Amendment*.—Upon the filing of such disclaimer, the plaintiff in such action filed an "additional paragraph of complaint," against such third person, asking that he be made a party "to answer as to" his "interest in and to the land mentioned in the complaint against" the original defendant, "and to show cause," if any he had, "why plaintiff should not have judgment for possession of the land," etc., and for "damages for being kept out of possession," etc.
Held, on demurrer, that such paragraph of complaint, considered either independently or as an amendment to the original complaint, which was in the ordinary form, was insufficient.
Held, also, that each paragraph of a pleading must be complete within itself, and that defects therein can not be aided by reference to another paragraph. *Ib.*
3. *Unlawful Detention*.—*Evidence*.—In an action to recover real estate, brought under the provisions of the acts of May 13th, 1852, and March 4th, 1853, (2 R. S. 1876, p. 662,) "concerning the unlawful detention of lands," etc., all defences may be given in evidence without plea, and, therefore, the sustaining of a demurrer to an answer in such action is harmless. *Poffenberger v. Blackstone*, 288
4. *Same*.—*Supreme Court*.—Where, in such action, the evidence is not in the record, on appeal to the Supreme Court, no question is presented by the overruling of a motion for a new trial. *Ib.*

REAL ESTATE, ALIENATION OF.

See PARTNERSHIP, 5; VENDOR AND PURCHASER.

RECEIVER.

See PARTNERSHIP, 2.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 35.

RECORDING INSTRUMENT.

See MECHANIC'S LIEN, 4, MORTGAGE, 3.

RECOUPMENT.

See USURY, 2 to 5.

REDEMPTION.

See PARTNERSHIP, 6, 7.

By Judgment Creditor.—Real estate sold at sheriff's sale by virtue of a decree of foreclosure of a mortgage thereon, accompanied by a personal judgment against the debtor, may be redeemed by the judgment creditor, from the purchaser, where the amount realized by such sale is insufficient to satisfy such judgment. *Greene v. Doane*, 186

REFORMATION OF INSTRUMENT.

See MORTGAGE, 2.

REFUNDING TAXES.

See TAXES, 1.

RELEASE.

See DECEDENTS' ESTATES, 2; MORTGAGE, 7; PLEADING, 1.

REMEDY.

See PROMISSORY NOTE, 8; TAXES, 1, 3.

REPEAL OF STATUTE.

See TAXES, 1; USURY, 2.

REFPLEVIN.

See RAILROAD, 5.

Justice of the Peace.—Title to Lands.—In an action by the guardian of certain minors, to recover possession of certain property, commenced before a justice of the peace and thence appealed to the circuit court, the complaint alleged, that the defendant had unlawfully entered upon certain real estate, belonging to such minors and another as tenants in common, and had cut down and converted into logs certain timber growing thereon, and had unlawfully carried the same away; that such logs were the property of such tenants in common; that the defendant unlawfully detains such logs from the plaintiff, "who is entitled to the possession thereof;" and that the same have not been taken by virtue of any execution, etc. Upon issue formed by an affidavit denying that the plaintiff was such guardian, there was a trial resulting in a general verdict for the plaintiff, and in special findings that no demand had been made before suit, that one of such wards was of age, and in possession of such real estate, at the commencement of the suit, and that such tenants in common were the owners of such real estate and logs.

Held, on appeal to the Supreme Court, the evidence not being in the record, that it does not appear that the title to real estate was in issue.

Held, also, that, under the allegations of the complaint, the plaintiff could, and the Supreme Court will presume he did, introduce evidence entitling him to a verdict.

Held, also, that the answers to interrogatories are not inconsistent with the general verdict.

Held, also, on motion in arrest, that the complaint is sufficient, the allegation as to the title to land being immaterial, and the gist of the action being as to the right of possession of the logs. *Deacon v. Powers*, 489

REVIEW OF JUDGMENT.

See DIVORCE, 6; JUDGMENT, 9, 10; JURY, 2.

INDEX.

REVIVOR.

See STATUTE OF LIMITATIONS, 3 to 7.

REVOCATION.

See ARBITRATION, 8, 9; BASTARDY.

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See CRIMINAL LAW, 18.

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See DECEDENTS' ESTATES, 9; JUDGMENT, 1; USURY, 5.

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See TAXES, 4, 5, 6.

SHERIFF.

See PLEADING, 11.

SHERIFF'S SALE.

See PRINCIPAL AND SURETY, 1; REDEMPTION.

SPECIAL FINDING.

See CONTRACT, 6.

SPECIFIC PERFORMANCE.

1. *Vendor and Purchaser — Tender.*—In an action by the purchaser, against the vendor, to enforce specific performance of a contract for the sale and conveyance of real estate, the complaint need not aver a tender of performance by the plaintiff, if there be an averment therein that the defendant had expressly repudiated the contract, and notified the purchaser that tender was waived. *Martin v. Merritt*, 34
2. *Same.—Husband and Wife.—Wife's Refusal to Convey.—Abatement of Price.*—In an action against a husband and wife, to enforce specific performance of a contract for the sale and conveyance of his real estate, executed by them to the plaintiff, if the wife avail herself of her coverture by plea, a decree of performance may nevertheless be rendered against the husband, conditioned, that, if the wife join in such conveyance, the plaintiff shall pay the full contract price therefor, but that otherwise such payment shall be abated to the amount of the ascertained value of the wife's inchoate interest in such real estate. *Ib.*
3. *Same.—Dower.—Evidence.*—Where, in such case, the evidence and finding are as to the value of her inchoate right of dower, the defendant can not complain of an abatement equal to such value. *Ib.*
4. *Same.—Promissory Note.*—Where such contract provides, generally, for deferred payments of portions of the purchase-money, the vendor can not demand the execution of promissory notes therefor, payable in bank. *Ib.*
5. *Same.—Purchaser's Option.*—Where such contract provides that the purchaser may accept the same within a specified time, at his option, an endorsement, on the contract executed by him, that he has accepted the real estate on the terms proposed, is a valid declaration of his option. *Ib.*

STATUTE CONSTRUED.

See CITIES AND TOWNS, 1, 4, 8; CRIMINAL LAW, 6, 24, 31, 41; DESCENTS; LIQUOR LAW, 9; RAILROAD, 7; SUPREME COURT, 26.

STATUTE OF FRAUDS.

See VENDOR AND PURCHASER, 1.

Contract in Consideration of Conveyance.—A verbal agreement by the grantee, with the grantor, of certain lands, that, in consideration of such conveyance, the former will support the latter during his life, is not within the statute of frauds. *Harper v. Harper*, 547

STATUTE OF LIMITATIONS.

See CRIMINAL LAW, 24.

1. *Official Bond.—Township Trustee.*—An action upon the official bond of a township trustee, if not commenced within three years after the accruing of the cause of action, is, as to sureties, barred by the statute of limitations. *Hawthorn v. The State, ex rel.*, etc., 286
2. *Same.—Amendment.*—If an action on such bond be commenced within three years after the cause of action has accrued, by an incompetent relator, and, after the expiration of that time, a substituted complaint by a competent relator be filed in such cause, the action, as to sureties, is barred. *Ib.*
3. *Revivor*—The statute of limitations of twenty years is a sufficient defence to an action by the State, on the relation of the Attorney General, to revive, and obtain execution on, a judgment rendered against the defendant in a criminal prosecution. *Strong v. The State, ex rel.*, etc., 428
4. *Same.—Payment.*—Where, in such case, a payment has been made on such judgment within twenty years, that fact should be replied. *Ib.*
5. *Same.—Payment of Costs.*—A payment of the costs accrued in such cause is not such a payment upon the judgment as will relieve it from the operation of the statute. *Ib.*
6. *Same.—Presumption.*—A partial payment of a debt, replied to the statute of limitations, raises only a *prima facie* presumption, that such payment is an admission of continued indebtedness. *Ib.*
7. *Exception.—Pleading.*—In an action on account for money loaned, where the six years' statute of limitations is pleaded, a reply that such money is part of a mutual running account, remaining unsettled, and extending up to the time of bringing the action, is sufficient on demurrer. *Harper v. Harper*, 547

SUBROGATION.

See VENDOR AND PURCHASER, 3.

SUBSCRIPTION.

See CONTRACT, 7; TURNPIKE, 3, 8, 9.

SUMMONS.

See PROCESS.

SUNDAY.

See CONTRACT, 1 to 4.

SUPERIOR COURT.

See SUPREME COURT, 22.

SUPREME COURT.

See CONTRACT, 7; CRIMINAL LAW, 2, 3, 12, 21; DIVORCE, 4; EVIDENCE, 3, 10, 13 to 16; INSTRUCTION TO JURY, 1; MORTGAGE, 1, 2, 13; NEW TRIAL, 3, 7; PLEADING, 7; PRACTICE, 3, 4, 6, 8, 12, 13, 14, 17; REAL ESTATE, ACTION TO RECOVER, 4; REPLEVIN.

1. *Bill of Exceptions.—Evidence.*—On appeal to the Supreme Court, from the finding of a court upon an application to it to set aside a default,

tried upon affidavits submitted by the parties, no question is presented as to the sufficiency of the evidence to sustain the finding, unless the bill of exceptions affirmatively shows that it contains all the evidence.

The Franklin Insurance Co., etc., v. Cook, 11

2. *Practice.—Pleading.*—Error in sustaining a demurrer to a paragraph of a pleading is not available on appeal to the Supreme Court, where the matter therein alleged was admissible and admitted in evidence, on the trial of the cause, under a remaining paragraph.
Martin v. Merritt, 34
3. *Practice.—Evidence.*—Where, on appeal to the Supreme Court, a fact essential to the validity of the finding may be fairly inferred from the evidence, the finding will not be disturbed merely because such fact was not distinctly proved.
The Ohio, etc., R. W. Co. v. Steen, 61
4. *Brief.—Practice.*—Where, on appeal to the Supreme Court, the brief of the appellant neither states nor discusses any question arising on the record, the judgment will be affirmed.
Martin v. Smith, 62
5. *Bill of Exceptions.—Time.*—The record of a cause appealed to the Supreme Court showed, that, in term time, a certain period had been granted within which to file a bill of exceptions, and that, after the expiration of such period and term, a bill of exceptions had been filed showing that a longer time, not then expired, had been granted for such filing.
Held, that, after the expiration of the term, the judge had no power to grant any, or a longer, time for filing a bill of exceptions, and that it had not been filed in time.
Whitworth v. Sour, 107
6. *Assignment of Error.—Practice.*—An assignment as error of a ruling which is merely cause for a new trial, presents no question to the Supreme Court, on appeal.
Grant v. Westfall, 121
7. *Same.*—Every cause for a new trial, properly assigned in the motion therefor, is brought before the Supreme Court for review, by an assignment as error of the ruling of the lower court on such motion. *Ib.*
8. *Verdict.—Practice.*—A verdict will not be disturbed by the Supreme Court, on appeal, where there is evidence tending to support it. *Ib.*
9. *Excessive Damages.—Practice.*—Where excessive damages are not assigned as cause in a motion for a new trial, the Supreme Court, on appeal, will not disturb the judgment, though it appear from the evidence that the damages assessed were excessive.
Hunt v. Milligan, 141
10. *Bill of Exceptions.—Practice.*—A bill of exceptions filed after the expiration of the time granted therefor forms no part of the record, on appeal to the Supreme Court.
Horning v. Wendell, 171
11. *Verdict.—Practice.*—Where the evidence is not in the record, on appeal to the Supreme Court, no question is presented as to whether or not the verdict is contrary to law or the evidence. *Vaughn v. Ferrall*, 182
12. *Judicial Notice.*—The Supreme Court, on appeal, takes judicial notice of the terms of circuit courts, and their duration. *Spencer v. Curtis*, 221
13. *Evidence.—New Trial.*—Where the grounds of objection to the admission of alleged erroneous evidence do not appear by the record, on appeal to the Supreme Court, no question in relation thereto is presented for decision.
McCormick v. Mitchell, 248
14. *Practice.—Motion to Strike Out.*—The overruling of a motion to strike out part of a pleading is not available as error on appeal to the Supreme Court, where it does not appear from the record that such ruling worked injustice.
City of Crawfordsville v. Brundage, 262
15. *Appeal.*—Prior to the taking effect of the act of March 14th, 1877, (Acts 1877, Spec. Sess., p. 59,) amending section 550 of the practice act, where set-off was pleaded in an action originating before a justice

- of the peace, the party against whom judgment was rendered might appeal to the Supreme Court, though such judgment was for less than ten dollars, if the amount of the judgment and his own claim exceeded that sum. *Shriver v. Bowen*, 266
16. *Practice.—Bill of Exceptions.*—The truth of matter alleged as cause for a new trial must, on appeal to the Supreme Court, be shown by a bill of exceptions, unless it otherwise appears. *Owen v. Owen*, 291
 17. *New Trial.—Assignment of Error.*—Matter which is merely cause for a new trial is not assignable as error, on appeal to the Supreme Court. *Shroyer v. Bash*, 349
 18. *Death of Party.—Judgment.*—Where, after the submission of a cause to the Supreme Court, on appeal, a party thereto dies, judgment in the cause may be afterwards rendered as of the term at which the cause was submitted. *Lockenour v. Sides*, 360
 19. *Pleading.*—Where no objection by demurrer, motion to make specific or motion in arrest is presented to a complaint, which, though defective in some of its averments, states facts sufficient to render a judgment thereon a bar to another action, such defects are cured by the verdict, and can not be presented to the Supreme Court by an assignment of error that the complaint is insufficient. *Donellan v. Hardy*, 398
 20. *Practice.—Evidence.*—Error in the admission of evidence, which was neither objected to nor assigned as cause for a new trial, is not available on appeal to the Supreme Court. *Leever v. Hamill*, 423
 21. *Same.*—The overruling of a motion to strike out part of a pleading is not available as error on appeal to the Supreme Court. *Brinkmeyer v. Helbling*, 435
 22. *Assignment of Error.*—An assignment of error, on appeal to the Supreme Court from the Superior Court, that the latter court erred at general term in affirming its judgment at special term, presents for decision all errors properly assigned at general term. *Alexander v. North-Western, etc., University*, 466
 23. *Harmless Error.*—Where no harm results from a ruling, to the party complaining thereof, it is not available as error. *Killian v. Eigenmann*, 480
 24. *Unavailable Error.—Judgment.*—Where the complaint in an action is insufficient, a judgment rendered therein for the defendant, on the trial of the cause, will not be reversed by the Supreme Court, on appeal, because of errors committed by the lower court against the plaintiff. *Gilbert v. Allen*, 524
 25. *Appeal.—Judgment.*—The refusal of the circuit court to confirm a report made by the trustee of an express trust, under a will, is not a final judgment from which an appeal will lie to the Supreme Court, but is merely an interlocutory order. *Thiebaud v. Dufour*, 598
 26. *Same.—Interlocutory Order.*—No appeal lies, under section 189 of the decedents' act, (2 R. S. 1876, p. 557,) from an interlocutory order, except as authorized by section 576 of the practice act. (2 R. S. 1876, p. 245.) *Ib.*

SURVEY.

See MORTGAGE, 13.

TAX DEED.

See TAXES, 2, 3.

TAXES.

See VENDOR AND PURCHASER, 1.

1. *Congressional School Lands.—Refunding Taxes.*—Prior to the taking effect of the act of February 8th, 1877, (Acts 1877, Reg. Sess., p. 139,) "declaring school lands taxable after they have been sold and before deed

is made," etc., an owner of certain of such lands filed his petition before the proper board of commissioners, asking the refunding of certain taxes paid thereon by him, alleged to have been assessed while held by a certificate of purchase, and before the same had been conveyed by deed. After such act had taken effect, on appeal to the circuit court, upon a special finding of the facts, in accord with the allegations of the petition, and as a conclusion of law thereon, judgment was rendered in favor of the petitioner.

Held, that taxes voluntarily paid are not recoverable, except by statute.

Held, also, that where a right of action, not existing at common law, is given by statute, a repeal of the same by another statute, containing no clause saving pending actions, takes away such right of action, in all such causes which have not proceeded to final judgment.

Held, also, that, prior to the taking effect of such statute of February 8th, 1877, such action could have been maintained under the provisions of the act of March 2d, 1853, (1 G. & H., p. 110,) "in relation to the refunding of taxes wrongfully assessed and collected."

Held, also, that such act of March 2d, 1853, so far as it authorizes the refunding of illegal taxes on school lands, is repealed by the act of February 8th, 1877. *The Board, etc., v. Ruckman*, 96

2. *Evidence.—Tax Deed.*—Where a tax deed fails to show that the personal property of the delinquent had been exhausted before the sale of his real estate, or that he had no such property, such deed, unless accompanied by proper evidence of such fact, is inadmissible as evidence of title. *Ward v. Montgomery*, 276
3. *Defect in Tax Deed.—Remedy.*—Where, in such action, through defects in his tax deed, the holder fails to establish his title to the real estate, he is entitled to have a decree against the realty for the amount found due him, under the provisions of section 257, 1 R. S. 1876, p. 129. *Ib.*
4. *Dog Tax.—Sheep.—Mandate.*—Mandate against the township trustee is not the proper remedy against the township, by the owner of sheep which have been killed by dogs. *Shelby Twp., etc., v. Randles*, 390
5. *Same.—Township Liable.*—Where such trustee has in his hands funds derived from the dog tax, which he refuses to apply to the payment of just claims for sheep killed by dogs, the township is liable to the owner of such sheep, in an action by him for the value thereof. *Ib.*
6. *Same.—Priority.*—Such claims must be paid in the order of their priority, out of such fund, as it is collected from year to year, it not having been intended by the Legislature that such fund for each year should satisfy such claims only as accrued in that year. *Ib.*

TELEGRAPH COMPANY.

1. *Message.—Character of.*—Upon payment or tender of its usual charges, a telegraph company is bound by law to transmit any message couched in decent language, which is placed in the hands of its agent for that purpose; though it may refuse to transmit one couched in indecent terms. *Western Union Telegraph Co. v. Ferguson*, 495
2. *Action for Damages.—Defence.*—In an action against a telegraph company, to recover the statutory penalty for refusing to transmit a proper message, an answer alleging such message to have been intended for an immoral purpose is insufficient. *Ib.*
3. *Same.—Pleading.—Evidence.*—In an action against a telegraph company for damages for failure to transmit a message, the plaintiff must aver in his complaint, and prove on the trial, that the defendant has a line of wires wholly or partly in this State, that it is engaged in telegraphing for the public, and that a particular message was placed in the hands of its agent, for transmission. *Ib.*

TENDER.

See CONTRACT, 7; RAILROAD, 2 to 5; SPECIFIC PERFORMANCE, 1;
TELEGRAPH COMPANY, 1.

TIME.

See CRIMINAL LAW, 5; JUDGMENT, 4.

TITLE-BOND.

See FRAUD, 1.

TOWNSHIP.

See TAXES, 5; TOWNSHIP TRUSTEE.

TOWNSHIP TRUSTEE.

See PAUPER; STATUTE OF LIMITATIONS, 1; TAXES, 4, 5, 6.

TRESPASS.

See CONTRACT, 5; EVIDENCE, 6.

Trover.—Conversion of Joint Property.—One who unlawfully takes possession of personal property belonging to joint owners, and converts to his own use, and sells the interest of either owner, without his consent, is guilty of a tort, and is liable to such owner for the value of such interest.
Collins v. Ayers, 239

TRIAL.

See ARBITRATION, 7.

TROVER.

See TRESPASS.

TRUSTEE.

See SUPREME COURT, 25.

TURNPIKE.

See CRIMINAL LAW, 31; PLEADING, 3; PROMISSORY NOTE, 1.

1. *Articles of Association.—Practice.—Pleading.*—Where the complaint in an action by a turnpike company alleges that a copy of its articles of association has been filed in the office of the recorder of the only county through which it is averred its road passes, an objection, that no such copy has been filed in the recorder's office of another county through which such road also passes, must be presented, not by demurrer, but by answer.
Miller v. Wild Cat G. R. Co., 241
2. *Same.—Map of Route.*—The line or route of the road of a turnpike company may be described in its articles of association by a map of such road, incorporated in such articles, showing the starting-point, line and terminus of the same.
Ib.
3. *Same.—Subscription.*—It is no defence to an action on a subscription of stock to a turnpike company, that the defendant was induced to make such subscription by false and fraudulent representations as to the terms of payment of the same, made to the defendant by the person soliciting his subscription.
Ib.
4. *Same.—Location of Turnpike on Highway.*—To an action to collect the last instalment of such subscription, the defendant answered, that the plaintiff had constructed its road on the line of a public highway, without having obtained the consent of the proper board of county commissioners.
Held, on demurrer, that the answer is insufficient.
Ib.
5. *Directors.—Election.—Quo Warranto.*—Irregularity in the election of the directors of a turnpike company is no defence to an action by such

- company to collect stock subscribed by the defendant to its articles of association, though it might be ground for a *quo warranto* to oust such directors. *Steinmetz v. Versailles, etc., Turnpike Co.*, 457
6. *Same.—Calls by Directors.*—Where, in such action, the complaint alleges the election of a board of directors, who then located the turnpike and made calls for the amounts of subscriptions, it is sufficiently shown that such election preceded the making of such calls. *Ib.*
 7. *Same.—Judicial Notice.*—The articles of association of such company, filed with the complaint in such action, are properly a part of the complaint, and where such articles state the termini of the road to be within a certain county, the courts of this State will take notice that a road running from one of such termini to the other is located wholly in such county. *Ib.*
 8. *Same.—Residence.*—The use of a double comma, following the name of a subscriber to such articles of association, under the name of a certain specified locality, sufficiently designates such subscriber's residence. *Ib.*
 9. *Same.—Failure to Designate.*—Where such articles fail to designate the residence of some of the subscribers, and improperly designate that of others, but the amount subscribed by those whose residence is rightly designated is sufficient to make the amount required by law, such subscriptions are valid. *Ib.*
 10. *Judgment—Appraisement.*—Judgment may be rendered in such action collectible without appraisement. *Ib.*

UNLAWFUL DETENTION.

See REAL ESTATE, ACTION TO RECOVER, 3.

USURY.

1. *Pleading.—Promissory Note.—Practice.*—Where, in an action on a promissory note, the defendant answers that such instrument is the last of a series of usurious renewals of a usurious promissory note, and that the real principal, and lawful interest thereon, have been overpaid, and asking to recoup the excess, an objection that the dates of such renewals, and of payments thereon, are not alleged, should be made, not by demurrer, but by motion to make specific. *Holcraft v. Mellott*, 539
2. *Recoupment.—Repeal of Statute.*—By the act of March 9th, 1867, (1 R. S. 1876, p. 599,) concerning interest on money and the recoupment of usury, so much of section 5 of the act of March 7th, 1861, (1 R. S. 1876, p. 599,) on the same subject, as amended by the act of December 19th, 1865, (3 Ind. Stat., p. 316,) as prohibited the recoupment of usury, was repealed, but that part of such section prohibiting a direct action therefor is still in force. *Ib.*
3. *Same.—Dismissal.—Practice.*—Where, in an action on a promissory note wherein the defendant answers seeking to recoup usurious interest, alleged to have been paid, the plaintiff dismisses his complaint, such dismissal carries all the pleadings out of court, and the defendant can not prove or recover such usury. *Ib.*
4. *Same.—Extent of Recovery.*—Recoupment of usurious interest, alleged to have been paid on a promissory note in suit, can be had only to the extent of any balance due on such note, and judgment for any excess of such usury can not be rendered. *Ib.*
5. *Same.—Set-Off.*—In recoupment the defendant can only use his claim in diminution or abatement of the plaintiff's cause of action, and can not, as in set-off, recover for the excess of his claim over that of the plaintiff. *Ib.*

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See APPRAISEMENT.

VARIANCE.

See CRIMINAL LAW, 23, 28.

VENDOR AND PURCHASER.

See PRINCIPAL AND AGENT; SPECIFIC PERFORMANCE.

1. *Conveyance.—Taxes.*—In consideration of the conveyance of certain real estate, by quitclaim deed, by A. to B., and the promise of the former to pay all delinquent taxes due thereon, B. conveyed certain real estate to A., by warranty deed, and also promised to pay all delinquent taxes thereon. Afterward, B., to save the real estate conveyed to him by A. from sale for such taxes, paid the same, and then brought an action therefor against A.

Held, that each conveyance, and the promise accompanying it, were the consideration for the other conveyance and promise.

Held, also, that the plaintiff may show, by parol evidence, the actual consideration of his deed to the defendant, and that the same, or some part thereof, remains unpaid.

Held, also, that the taxes due on the land conveyed by B. were exempt from the operation of his warranty.

Held, also, that A.'s promise to pay the taxes due on the land conveyed by him is not within the statute of frauds. *Headrick v. Wischart*, 129

2. *Conveyance.—Quantity Conveyed.—Fraud.*—In an action against the purchaser of a tract of real estate, conveyed to him by a warranty deed as containing a specified number of acres, "more or less," to recover for purchase-money evidenced by a promissory note, and to foreclose a mortgage given to secure its payment, it is no defence to answer, that, during the negotiations resulting in such conveyance, representations upon which the defendant relied, and which subsequently proved to be untrue, were made by the vendor to the purchaser, that the tract so conveyed contained a certain number of acres, unless it be also alleged that such representations were made fraudulently and with intent to deceive the purchaser. *Joselyn v. Edwards*, 212

3. *Same.—Assuming Encumbrance.—Subrogation.—Foreclosure.*—A tract of real estate, which was encumbered by a mortgage executed by the owner to another, to secure the payment of a promissory note for a certain sum, waiving valuation laws and stipulating for attorney's fees, was conveyed by the owner to a third person by a deed, which, particularly describing such encumbrance, provided that the grantee, as part of the consideration for such conveyance, should assume and pay the same at maturity, "in accordance with the terms thereof." Such grantee having made default in such payment, his grantor paid off the same and brought an action against the grantee to recover the same.

Held, that the plaintiff, being himself bound for such debt to the mortgagee, by paying off the same, became subrogated to the rights of the latter, and was entitled to a judgment for the amount of such note, waiving valuation laws and including attorney's fees, and to have foreclosure of such mortgage.

Held, also, that, as between the defendant and plaintiff, their relations became, by such contract of conveyance, that of principal and surety respectively on such debt. 16.

VENUE.

See CRIMINAL LAW, 5.

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See CRIMINAL LAW, 1.

1. *From Judge and County*.—A party to an action is not precluded from taking a change of venue from the judge, by the fact that he has theretofore taken a change from the county. *Shriver v. Bowen*, 266
2. *Same*.—A party to an action is not precluded from taking a change from the judge before whom the cause is pending, by the fact that he has obtained a change of venue from the county. *Leary v. Ebert*, 415
3. *Same*.—*Affidavit*.—Whenever the judge of a court is notified in any manner, whether by affidavit or by a mere suggestion of a party, that a cause in which he has acted as counsel is pending before him, it is his privilege, as well as his duty, to refuse to try such cause, and to set the same for trial before some other judge. *Joyce v. Whitney*, 550

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WILL.

See DECEDENTS' ESTATES, 1; DIVORCE, 8.

1. *Insanity of Testator*.—A person who has become the victim of mental derangement, amounting to insanity in any form, is, under the statute of this State, incompetent to make a will. *Eggers v. Eggers*, 461
2. *Instruction to Jury*.—*Partial Insanity*.—On the trial of an action to revoke the probate of the will of a testator on the alleged ground of his insanity, an instruction to the jury, that, though the testator might have been, to some extent, insane, yet such insanity would not avoid the will, unless it could be shown to have entered into or affected the will itself, is erroneous. *Ib.*
3. *Witness*.—*Expert*.—It is error in the court in such action, in instructing the jury as to the opinions of witnesses regarding the sanity of the testator, and as to the opinions of experts upon hypothetical questions, to direct them as to the weight to be given to such evidence. *Ib.*
4. *Same*.—An instruction to the jury in such case, that "the testimony of experts is usually of very little value in determining the sanity or insanity of a party," is erroneous. *Ib.*

5. *Same.—Credibility.*—The credibility of experts testifying as witnesses is tested by the same rules as are applied to any other class of witnesses. *Ib.*

WITNESS.

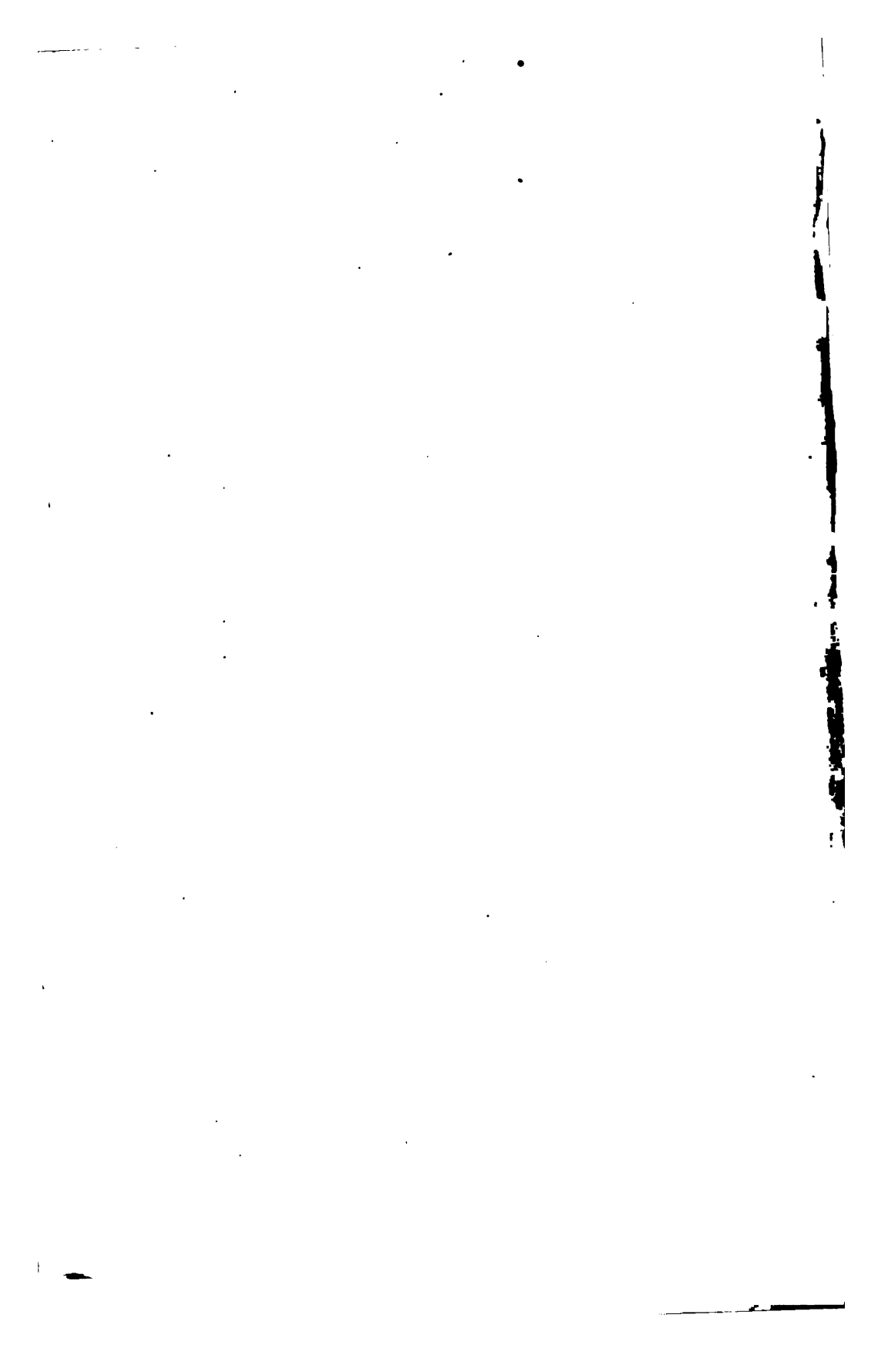
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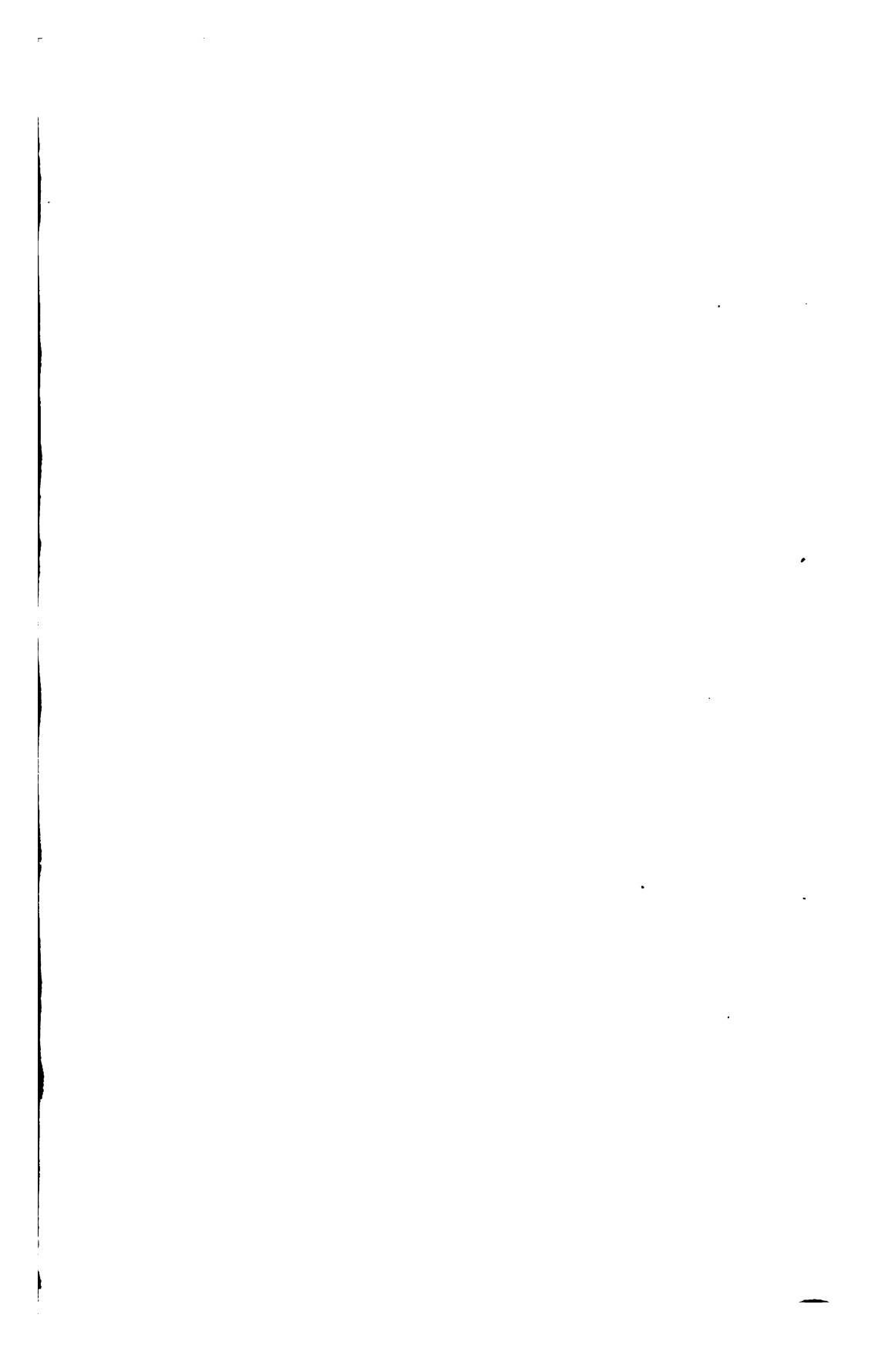
Impeachment.—Evidence.—On the trial of an action to recover for services alleged to have been performed by the plaintiff, for and at the request of the defendant, where the defence is, that such services had been performed for, and on the credit of, the defendant's contractor, to which the latter has testified on behalf of the defendant, the plaintiff may then, after laying the proper ground, impeach such witness, by giving evidence of statements made by him, that the plaintiff had been hired by, and on the credit of, the defendant. *Wilkerson v. Rust*, 172

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